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CADBURY TWENTY YEARS ON

CALLY JORDAN*

I. INTRODUCTION

IT all started innocuously enough: an industry committee struck in the wake of a spate of corporate scandals. But even before the final report appeared, it had captured public attention in the United Kingdom, much to the astonishment of its authors. The modern debate on corporate governance had begun.

II. THE CADBURY REPORT 1992

The London Stock Exchange, the Financial Reporting Council, and the accountancy profession in the U.K. published their committee report, “The Financial Aspects of Corporate Governance” on 1 December 1992, some twenty years ago. The report quickly became known by the name of its chairman, Sir Adrian Cadbury, as the “Cadbury Report.” It had begun as a modest exercise in response to several high profile cases of corporate fraud and director malfeasance.

In particular, the dramatic disappearance of Jan Ludvik Hoch off his yacht in the Canary Islands on November 5, 1991 had captured headlines and fuelled public anger in the U.K. He had simply vanished, and so had funds from the employee pension funds of the companies he operated. Born in the former Czechoslovakia, he was known in the U.K. as Robert Maxwell and held sway over a newspaper empire. At the time of his disappearance, there was much speculation as to what had occurred. Did he slip? Did he commit suicide in remorse? Did an irate defrauded pensioner push him? Or, perhaps, in a James Bond moment, he was spirited away by helicopter to a new life in an unknown location?¹ This was the stuff of tabloid news and caught the imagination of the public.

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1. According to Wikipedia, this was quite literally a James Bond moment. The disappearance of Robert Maxwell inspired the end of the 18th Bond film *Tomorrow Never Dies*, in which the villain was a newspaper magnate who tried to take over the

To the surprise of Sir Adrian Cadbury and his colleagues, the Cadbury Report was an unlikely bestseller:

When our Committee was formed . . . neither our title nor our work programme seemed framed to catch the headlines. In the event, the Committee has become the focus of far more attention than I ever envisaged The harsh economic climate is partly responsible, since it has exposed company reports and accounts to unusually close scrutiny. It is, however, the continuing concern about standards of financial reporting and accountability, heightened by BCCI, Maxwell and the controversy over directors' pay, which has kept corporate governance in the public eye.²

The focus of the Committee had been a fairly narrow one, the control and reporting functions of boards of directors and the role of auditors, however the proposals sought "to contribute positively to the promotion of good corporate governance as a whole."³ Although the report and its appendices run to some ninety pages, "the heart"⁴ of the report, and what made it famous, was the Code of Best Practice which would be implemented by the London Stock Exchange. The Code of Best Practice was succinct and to the point; barely two pages long.⁵ It raised the issue of separating the role of Chief Executive Officer (CEO) and Chairman; suggested the use of non-executive directors (NEDs) and the desirability of independence; recommended the appointment of NEDs to an audit com-

world from a boat, where a final fight scene takes place. See *Robert Maxwell*, WIKIPEDIA, http://en.wikipedia.org/wiki/Robert_Maxwell (last modified Sept. 14, 2012, 4:03 PM) (providing overview of Robert Maxwell's life). On a more serious note, the BBC reported that his body was recovered from "the sea off the Canary Islands after he had been reported missing from his private yacht." *Robert Maxwell: A Profile*, BBC NEWS WORLD EDITION (Mar. 29, 2001), <http://news.bbc.co.uk/2/hi/business/1249739.stm>. Likewise, the Guardian also published a report that Maxwell's body was found after being missing for at most one day. See Ben Laurance et al., *Maxwell's Body Found in Sea*, GUARDIAN (Nov. 6, 1991), <http://www.guardian.co.uk/politics/1991/nov/06/politicalnews.uk>.

2. ADRIAN CADBURY, REPORT OF THE COMMITTEE ON THE FINANCIAL ASPECTS OF CORPORATE GOVERNANCE 9 (1992), available at <http://www.ecgi.org/codes/documents/cadbury.pdf>. [hereinafter CADBURY REPORT].

3. *Id.* at 11.

4. See *id.* (stating "Code of Best Practice" is main part of Committee's recommendations).

5. See *id.* at 57–59. The main provisions of the Code of Best Practice delineate an ideal relationship between the roles of directors (both executive and non-executive), shareholders, and auditors. The key provisions are provided in sections 1.1, 2.1, 3.1, and 4.1. Section 1.1 states: "[t]he board should meet regularly, retain full and effective control over the company and monitor the executive management." *Id.* at 58. Section 2.1 states: "[n]on-executive directors should bring an independent judgement to bear on issues of strategy, performance, resources, including key appointments, and standards of conduct." *Id.* Section 3.1 states: "[d]irectors' service contracts should not exceed three years without shareholders' approval." *Id.* at 59. Section 4.1 states: "[i]t is the board's duty to present a balanced and understandable assessment of the company's position." *Id.*

mittee of the board of directors, all in the interests of providing some oversight and checks and balances to corporate decision making.⁶

Audit committees and non-executive directors were not new; the Cadbury Report itself was picking up the provisions from the New York Stock Exchange listing rules. Separation of CEO and Chairman of the board, however, was a more European than American approach, harkening to the German governance structures of the dual board, where the Supervisory Board provides oversight (with no overlap) to the Management Board. So there were no radically new propositions in the Code of Best Practice of the Cadbury Report. The propositions, though, were stated simply and were clearly articulated. Variations on these propositions have proliferated over time.

Perhaps the greater significance of the Cadbury Report lies elsewhere. Two features stand out. First, the Cadbury Report provided a short and sweet definition of corporate governance: “Corporate governance is the system by which companies are directed and controlled.”⁷ Answering the question, “what is corporate governance?” has always been fraught with difficulty. The Cadbury definition has proved remarkably enduring, being picked up repeatedly in the corporate governance literature around the world. It is the definition used by the OECD and the latest iteration of the Code of Best Practice, the U.K. Corporate Governance Code 2010.

Despite its deceptive simplicity, the Cadbury Report definition of corporate governance is problematic and should be approached with caution. Even in the U.K., it may, in fact, not represent a modern understanding of corporate governance. A few years after the Cadbury Report appeared, Professor Kenneth Scott of Stanford Law School provided a more nuanced but equally problematic answer to the question “What is corporate governance?”

In its most comprehensive sense, “corporate governance” includes every force that bears on the decision-making of the firm. That would encompass not only the control rights of the stockholders, but also the contractual covenants and insolvency powers of debt holders, the commitments entered into with employees and customers and suppliers, the regulations issued by governmental agencies, and the statutes enacted by parliamentary bodies. In addition, the firm’s decisions are powerfully affected by competitive conditions in the various markets in which it operates. One could go still further, to bring in the social and cultural norms of the society. All are relevant, but the analysis

6. *See id.* at 58–59.

7. *Id.* at 15.

would become so diffuse that it risks becoming unhelpful as well as unbounded.⁸

The factors which Scott identifies (the exercise of shareholder voting power, creditors' contractual rights and powers in insolvency, commitments to employees, customers and suppliers, the interplay of regulation and statute, social and cultural norms) are of much greater significance now than at the time of the Cadbury Report. Implicit in the legislative and societal framework in which corporations operate in many places in the world, these factors have now taken express legislative form in the recent U.K. Companies Act 2006.⁹ Thus, in spite of its popularity, the Cadbury Report definition of corporate governance may have been overtaken by events.

The second significant feature of the Cadbury Report, also problematic, is the way in which its proposals were to be implemented:

The London Stock Exchange intend to require all listed companies registered in the United Kingdom, as a continuing obligation of listing, to state whether they are complying with the Code and to give reasons for any areas of non-compliance. . . . The obligation will be enforced in the same way as all other listing obligations. This may include, in appropriate cases, the publication of a formal statement of censure.¹⁰

Thus was born the voluntary code of corporate governance, and its associated “comply or explain” implementation mechanism.

At this point, it is useful to remember that the Cadbury Report could do little else. It was a private sector initiative (the London Stock Exchange, the Financial Reporting Council, and the accountancy profession). It was not a government-led regulatory initiative and could thus not suggest recourse to more robust implementation measures, although it might have suggested more coercive use of the contractual listing rules (“comply or delist,” perhaps).

But the most remarkable phenomenon associated with the Cadbury Report is how quickly it proliferated and how internationally influential it became. In the U.K. itself, it proved somewhat controversial, triggering successive waves of rethinking, recalibration, reports and “codes,” culminating most lately in the U.K. Corporate Governance Code of 2010 and its

8. Kenneth E. Scott, *Corporate Governance and East Asia* 2–3 (Stanford Law Sch. John M. Olin Program in Law & Econ., Working Paper No. 176, 1999), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=173369.

9. See Companies Act, 2006, c. 46, § 174 (Eng.) (describing duty directors of companies have to exercise reasonable care, skill, and diligence).

10. CADBURY REPORT, *supra* note 2, at 11.

companion, the U.K. Stewardship Code 2010.¹¹ As a result, the Cadbury Report went viral.¹²

There are a number of possible reasons for this. The Cadbury Report was the initiative of the London Stock Exchange, the most international of all exchanges at the time with hundreds of non-U.K. companies listed and news of the Cadbury Report would have spread quickly internationally.¹³ Secondly, this period marked the beginning of the great re-alignment among exchanges around the world; exchanges were well connected through industry associations (for example, the World Federation of Exchanges, the Federation of European Securities Exchanges),¹⁴ and closely monitored developments in competing markets. In addition, there was the usual, and often underestimated, old colonial network of the Commonwealth.¹⁵ Commonwealth countries span the globe, encompassing economies at all levels of development and remain to this day surprisingly interconnected through the persistence of legislative and judicial legacies. The proposals themselves were also attractive in their simplicity, making them accessible to a broad audience, as well as being championed by an appealing and well-known figure, Sir Adrian Cadbury.

III. CORPORATE GOVERNANCE GOES GLOBAL

Significantly, in addition to propagation and replication at national levels, primarily through Commonwealth channels, the Cadbury Report laid the groundwork for the development of international standards of corporate governance. Here is a most interesting and reinforcing phenomenon: a national level initiative, very much a product of its own time and place, is shot into the international stratosphere to form the nucleus

11. See *infra* note 74 (discussing impact and implementation of U.K. Corporate Governance Code and U.K. Stewardship Code). See generally FIN. REPORTING COUNCIL, THE UK CORPORATE GOVERNANCE CODE (2010), available at <http://www.frc.org.uk/getattachment/b0832de2-5c94-48c0-b771-ebb249fe1fec/The-UK-Corporate-Governance-Code.aspx>; FIN. REPORTING COUNCIL, THE UK STEWARDSHIP CODE (2010), available at <http://www.frc.org.uk/FRC-Documents/FRC/The-UK-Stewardship-Code.aspx>.

12. This is all the more remarkable, given that at the time of its appearance, the internet was in its infancy.

13. Arguably this is still the case.

14. The World Federation of Exchanges was founded in 1961. The Federation of European Securities Exchanges was founded in 1975.

15. For example, the Cadbury Report in the U.K. was quickly followed the next year by a similar report in Canada. See TORONTO STOCK EXCH. COMM. ON CORPORATE GOVERNANCE, WHERE WERE THE DIRECTORS?: GUIDELINES FOR IMPROVED CORPORATE GOVERNANCE IN CANADA (1994) [hereinafter DEY REPORT]; see also CHOW MAN YIU, CHIEF EXECUTIVE'S REVIEW (2006), available at http://www.hkex.com.hk/eng/exchange/invest/finance/2005/documents/f107_05.pdf (providing Hong Kong Exchange's strategic plan to provide world-class marketplace for Hong Kong); KING COMMITTEE ON CORPORATE GOVERNANCE, KING REPORT ON CORPORATE GOVERNANCE (1994).

of free-floating international standards. International standards then become the benchmark for national and even firm-level initiatives.

In this case, the Organization for Economic Cooperation and Development (OECD) provided the forum, and the Cadbury Report the catalyst. In April 1998, the OECD published a short, and not particularly memorable, report, “Corporate Governance: Improving Competitiveness and Access to Capital in Global Markets” (“OECD Report”).¹⁶ Notable is the change in emphasis: “competitiveness” and “access to capital” replaced the “high standards of corporate behavior” and “accountability” of the Cadbury Report.

The corporate governance debate had crossed the Atlantic; the chair of the OECD Report was a senior Wall Street lawyer, Ira Millstein. But Sir Adrian Cadbury was sitting right beside him. The OECD Report was somewhat inconclusive, demonstrating internal tensions and decidedly the product of a committee representing the usual suspects of various dominant national viewpoints of the time (Germany, France, Japan, the United States, and the U.K.).¹⁷ In the words of the OECD Report, “[e]xperimentation and variety should be expected.”¹⁸

It was a report that could have gone on to collect dust in the archives. However, something surprising happened. Barely a year later appeared a full-blown set of international standards, the OECD Principles of Corporate Governance 1999 (“OECD Principles 1999”). The OECD Principles 1999 were not the product of experimentation and variety; they had been commandeered by the Anglo-American duo, Millstein and Cadbury, who became their international champions in appearances around the world. A U.K. code of corporate governance had been transformed into a set of international standards wrapped within the framework of the U.S. Revised Model Business Corporations Act.¹⁹ The OECD Principles 1999 broadened the focus of the original Cadbury Report (which, because of its some-

16. See BUS. SECTOR ADVISORY GRP. ON CORPORATE GOVERNANCE, CORPORATE GOVERNANCE: IMPROVING COMPETITIVENESS AND ACCESS TO CAPITAL IN GLOBAL MARKETS—A REPORT TO THE OECD BY THE BUSINESS SECTOR ADVISORY GROUP ON CORPORATE GOVERNANCE (1998) [hereinafter OECD REPORT], available at http://www.oecd-ilibrary.org/industry-and-services/corporate-governance-improving-competitiveness-and-access-to-capital-in-global-markets_9789264162709-en (presenting report regarding corporate governance to contribute positively to economic performance of corporations in OECD countries).

17. The committee writing the report was composed of Ira Millstein (Weil Gotshal, New York), Sir Adrian Cadbury (U.K.), Michel Albert (Banque de France), Robert Denham (Salomon Inc., New York), Dieter Fedderson (German lawyer with U.S. firm White & Case), and Nobuo Tateisi (Japanese executive, graduate of Columbia Business School, New York).

18. OECD REPORT, *supra* note 16, at 8 (noting corporate governance practices are constantly evolving and there is no universal model or final structure in corporate governance that all countries and corporations should follow).

19. Note that even in the OECD Report of 1998, which clearly reflected non Anglo-American perspectives, both the German and Japanese representatives had strong New York connections.

what narrow mandate, had focused on directors and accountability) to bring shareholders into the picture but subsumed all the associated underlying assumptions of the so-called “Anglo-American” model of the time: widely dispersed shareholders, the textbook “agency” problem, unitary board structure, little consideration given to “stakeholders,” and so on.

Codes of corporate governance, based on the OECD Principles 1999, spread like wildfire across the globe, due to a confluence of circumstances. There was the credibility and backing of the OECD, of course, with its regional roundtable programs being particularly effective propagators. The OECD Report of 1998 had specifically identified the promotion of access to capital as a goal of corporate governance; capital markets were rapidly internationalizing. During this period there was also an explosion of crisis-driven international financial standard setting. In this case, triggered by the Asian financial crisis of 1997–1998.

In the wake of the Asian financial crisis, the International Monetary Fund (IMF) and the World Bank engaged in the propagation of international financial standards with missionary zeal. The OECD Principles 1999 appeared just as the Financial Stability Forum (“FSF”)—the predecessor institution to the current Financial Stability Board—was established and the Financial Sector Assessment Program (“FSAP”) launched by the IMF and the World Bank. The IMF had been caught flat-footed by the Asian financial crisis and much criticized. The FSAP exercises, whereby the financial systems of countries were benchmarked and rated, country-by-country, against sets of international financial standards were designed to act as both a prophylactic and an early warning system.²⁰ The FSF formally adopted twelve sets of international financial standards for this purpose, including the OECD Principles 1999. Small armies of international bureaucrats, the book of international financial standards in hand, fanned out across the globe to spread the word.

In January 1999, the author, then newly engaged World Bank staff, was sent, OECD Principles 1999 in hand, to Indonesia to promote their adoption as part of the crisis resolution team. A classic confrontation of legal cultures ensued in meetings with leading legal practitioners in Jakarta. What did the OECD Principles 1999 mean when referring to “directors?”; Indonesia had a European style dual board structure. Why would one need independent directors (and on what board) in a dual board structure? What is the role of an audit committee (and what is it a committee of) where there is an internal audit board? How do these principles apply to state-owned enterprises or majority controlled listed corporations? All very good questions, demonstrating the difficulties associated with dropping assumption-ridden “international” standards into non-native legal environments.

20. See Cally Jordan, *The Dangerous Illusion of International Financial Standards and the Legacy of the Financial Stability Forum*, 12 SAN DIEGO INT’L L.J. 333, 346 (2011) (explaining role of FSF and FSAP).

IV. AN ACCELERANT TO THE CORPORATE GOVERNANCE WILDFIRE:
THE LEGAL ORIGINS LITERATURE

In the case of international corporate governance standards, there was an additional accelerant to the wildfire of the OECD Principles 1999: the “legal origins” literature, which began to appear at about the same time.²¹ Some financial economists immediately contested the legal origins theories.

First, it does not seem that legal or cultural impediments to financial development are as serious as one might have concluded from recent literature. Somewhat facetiously, one does not have to have the good fortune of being colonized by the British to be able to have vibrant financial markets. However, the main impediment we identify—the political structure within the country—can be as difficult to overcome as more structural impediments.²²

Misguided though this literature was, it was extremely influential, and rapidly became conventional wisdom. This literature looked to the two main legal traditions in developed economies, the Anglo-American common law tradition and the continental European “civil” or Romano-Germanic legal tradition, to conclude that the level of legal enforcement and the origin of

21. See generally Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998), available at <http://www.economics.harvard.edu/faculty/shleifer/paper> (examining legal rules concerning protection of corporate creditors and shareholders, their origin, and quality of their enforcement in forty-nine countries); Rafael La Porta et al., *Investor Protection and Corporate Governance*, 58 J. FIN. ECON. 3 (2000), available at http://www.economics.harvard.edu/files/faculty/56_IP_CorpGov.pdf; Rafael La Porta et al., *Investor Protection and Corporate Valuation*, 57 J. FIN. 1147 (2002), available at <http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.11.8336>. More recently, see Rafael La Porta et al., *What Works in Securities Laws?* (Tuck Sch. of Bus., Working Paper No. 03-22, 2003), available at <http://www.ssrn.com/abstract=425880>. The legal origins literature referred to in this article is primarily based on the La Porta studies:

Because legal origins are highly correlated with the content of the law, and because legal families originated before financial markets had developed, it is unlikely that laws were written primarily in response to market pressures. Rather the legal families appear to shape the legal rules, which in turn influence financial markets.

Investor Protection and Corporate Governance, *supra*, at 9, 21 (noting that “legal rules do matter”). For a comprehensive discussion of the literature, see Katharina Pistor et al., *The Evolution of Corporate Law: A Cross-Country Comparison*, 23 U. PA. J. INT’L ECON. L. 791 (2002).

22. Raghuram G. Rajan & Luigi Zingales, *The Great Reversals: The Politics of Financial Development in the Twentieth Century* 35 (Org. Econ. Cooperation & Dev. Econ. Dept., Working Paper No. 265, 2000). Legal academics in the United States have responded in a variety of ways, ranging from gentlemanly chiding to outright parody. See Mark J. Roe, *Corporate Law’s Limits*, 31 J. LEGAL STUD. 233 (2002); Mark D. West, *Legal Determinants of World Cup Success* (Univ. of Mich. John M. Olin Center for Law & Econ., Working Paper No. 02-009, 2002), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=318940.

the rules correlated to the level of development of both equity and debt markets.²³ Measures of investor protection appeared superior in common law countries and translated into more vibrant equity markets, they surmised from their findings.²⁴ Crudely put, it came to stand for the proposition that “Anglo-Saxon” or common law legal systems were superior in promoting the development of financial markets.

In particular, the legal origins literature was picked up by the international financial institutions, such as the World Bank and the IMF, and rolled into their financial sector assessment processes, as well as its subsequent refinement sponsored and conducted by them.²⁵ Legal origins authors made frequent appearances at various forums sponsored by the international financial institutions. The propositions behind the legal origins literature proved very convenient, fuelling the debate on the inevitable convergence of legal norms to international (read: common law) standards. The legal origins literature justified the transplantation, or more coercively, the imposition, of handy Anglo-American legal concepts and models around the world, irrespective of their appropriateness or likely effectiveness. The OECD Principles 1999 fit the bill perfectly. Cadbury-esque corporate governance codes popped up like mushrooms everywhere, from Algeria to Yemen.²⁶

V. RECASTING LEGAL ORIGINS

However, the rush towards adoption of international standards and quick fix voluntary codes of corporate governance ignored some very basic tenets of how legal systems adapt and change. Legal origins do matter, but not in the way postulated by the legal origins literature, which overlooks the complexity and dynamism of legal systems. The legal origins literature also just got the law wrong, but that is a different issue.

With its groundings as a customary law and a long tradition of self-regulation, the English common law system²⁷ is quite open to industry-specific initiatives, which do not take legislative form. Legislation, written

23. See generally William W. Bratton & Joseph A. McCahery, *Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross Reference*, 38 COLUM. J. TRANSNAT'L L. 213 (1999).

24. See *id.* at 228–30.

25. At an APEC meeting in Sydney, Australia, in late 1998, the author was presented with an early draft of one of the first in the series of legal origins papers; it had purportedly been commissioned by the International Finance Corporation, a member of The World Bank Group.

26. By one count, and not an exhaustive one at that, there are nearly one hundred countries, regions and organizations that have adopted corporate governance codes. A list of national corporate governance codes and reports is available at European Corporate Governance Institute's website. See, *Index of Codes*, EUROPEAN CORPORATE GOVERNANCE INST., http://www.ecgi.org/codes/all_codes.php (last visited June 5, 2012).

27. Not to be confused with the U.S. legal system, which demonstrates quite different characteristics despite its origins in the English common law.

law, has been traditionally seen as a last resort, representing a failure of the common law (based on custom and the judiciary). Until very recent times, if anything, there was a palpable aversion to written legislation. Legislative “codes,” in the continental European sense, smacked of revolution and the barricades. So sector-specific “voluntary” initiatives may have considerable persuasive force in such a system. These are codes as “a set of conventions or moral principles governing behaviour in a particular sphere” in one sense of the term, according to the Oxford English Dictionary.²⁸

However, in continental European legal systems, primacy of place is given to written legislation, in a multitude of forms (constitution, executive decree, civil and commercial codes, special statutes, etc.). The concept of a “voluntary” code, in such systems, is an oxymoron. Codes are a very strong form of formal written legal rule, trumping statute in the legislative hierarchy, second only to the constitution. These are codes, in the sense of the Oxford English Dictionary, “a systematic collection of laws or statutes.”²⁹

The U.S. legal system, for various historical reasons, demonstrates strong influences from each formative system; there is a lot of written law in the United States, as well as a judicially crafted common law.

In many respects US law represents a deliberate rejection of common law principle, with preference being given to more affirmative ideas clearly derived from civil law. These were not somehow reinvented in the United States but taken over directly from civilian sources in a massive process of change in adherence to legal information in the nineteenth century.³⁰

As a means of looking at how various corporate governance mechanisms operated in legal systems around the world, Cally Jordan and Mike Lubrano in 2002 identified a “dynamic corporate governance continuum.”³¹ The same corporate governance mechanism could be expressed in different ways and different forms in different places. Sometimes a “rule” would take several different forms contemporaneously, in a reinforcing fashion; sometimes “rules” would slide back and forth over time along the continuum, depending on prevailing circumstances.

28. See *Code*, OXFORD DICTIONARIES, <http://oxforddictionaries.com/definition/english/code> (last visited Feb. 5, 2012).

29. See *id.*

30. H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* 230 (2d ed. 2004).

31. See generally Cally Jordan & Mike Lubrano, *How Effective Are Capital Markets in Exerting Governance on Corporations?*, in *FINANCIAL SECTOR GOVERNANCE: THE ROLES OF THE PUBLIC AND PRIVATE SECTORS* 327 (Robert E. Litan, Michael Pomerleau & V. Sundararajan eds., 2002).

THE DYNAMIC CONTINUUM OF CORPORATE GOVERNANCE RULES³²

	Legal Sensibilities	Standards of Behavior	Private Rules	Quasi-Private/ Public Rules	Public Rules
Ex Ante	Moral Obligation	Voluntary Codes	Contract	Stock Exchange Listing Rules	Legislation
Ex Post	Moral Opprobrium	Reputational Consequences	Arbitration	Specialized Arbitration	Judicial Action
Less formal <-----> More formal					

In the unitary board systems of the common law, audit committees are an example. In the U.K., the requirement for audit committees remains embedded in the “voluntary” codes—Cadbury and its progeny. In the United States, the audit committee originated in the 1978 New York Stock Exchange rules (which is where Cadbury picked it up); but it was a mandatory requirement for all NYSE listed companies (and not a comply or explain rule). Canada had made the audit committee a statutory requirement for publicly traded corporations under the Canada Business Corporations Act of 1975.³³ In 2002, in the United States, the audit committee requirement moved along the continuum into statute, and became applicable to all publicly traded corporations (a much larger universe than NYSE listed corporations), with enactment of the infamous Sarbanes-Oxley Act.³⁴

AUDIT COMMITTEES: ONE RULE, THREE FORMS

VOLUNTARY CODE (STANDARD OF CONDUCT)	SEMI-PUBLIC (CONTRACT PLUS STATUTORY BACKING)	Public (Legislation)
U.K. Cadbury Report/ Combined Code (1992/ 1998/2008)	NYSE Listing Rules (1978)—mandatory	Canada Business Corporations Act 1975
U.K. Code of Corporate Governance 2010	London Stock Exchange—comply or explain	Sarbanes-Oxley 2002 (U.S.)

Notable here is the persistent adherence, in the U.K., to the voluntary code of corporate governance established by the Cadbury Report.

32. See Cally Jordan, *The Conundrum of Corporate Governance*, 30 BROOK. J. INT’L L. 983, 998 (2005). These insights have since been picked up in the “hard law”/ “soft law” debate in the wake of the financial crisis and a renewed interest in international financial standard setting. See Chris Brummer, *How International Financial Law Works (and How It Doesn’t)*, 99 GEO. L.J. 257 (2011).

33. See Canada Business Corporations Act, R.S.C. 1985, c. C-44.

34. See Sarbanes-Oxley Act of 2002, Pub. L. No 107-204, § 301, 116 Stat. 745, 745 (noting audit committee requirement for public companies).

VI. CORPORATE GOVERNANCE CODES ABROAD

So, how did these Cadbury-style corporate governance codes fare outside of the U.K.? Three examples are discussed below: China, Germany, and Italy.

A. *China—Corporate Governance with Chinese Characteristics*

China was an early adopter. A “Code of Corporate Governance for Listed Companies”³⁵ appeared in 2001, soon after the OECD Principles 1999. The Code followed “commonly accepted standards in international corporate governance” and followed the structure of the OECD Principles 1999.³⁶ There the similarities ended for the most part. This Code was hardly voluntary, taking the form of a regulatory decree. Despite the superficial similarity in organization to the OECD Principles 1999, the content of the Code was quite different. It contained statements such as: “assets of a listed company belong to the company.”³⁷ The company as a legal institution was brand new in China, the first modern companies act at that time having come into effect only six years before. The major purpose to be served by that legislation was “corporatization” of state-owned enterprises so as to permit partial flotation on domestic and foreign stock exchanges (but with the state remaining firmly in control). Again, despite superficial (and quite deliberate) resemblances to English and European companies, these Chinese companies were very different beasts underneath the surface.

Rapid change is the norm in China though, and by 2006 there was a new, much more sophisticated companies law in place, adapted to a wider variety of purposes. The new legislation includes a specific corporate governance section, entitled “Special Provisions on Organizational Structure of Listed Companies.”³⁸ And what do we find in that section, but some of the “indicia” of investor (shareholder) protection from the legal origins

35. See CHINA SEC. REGULATORY COMM’N, CODE OF CORPORATE GOVERNANCE FOR LISTED COMPANIES (2001), available at http://www.csrc.gov.cn/pub/csrc_en/newsfacts/release/200708/t20070810_69223.htm (promoting establishment and improvement of modern enterprise system by listed companies, standardizing operation of listed companies, and bringing forward healthy development of securities market in China).

36. See *id.* (setting forth basic principles for corporate governance of listed companies in China).

37. See *id.* (making statements such as “assets of a listed company belong to the company”).

38. See Companies Law of the People’s Republic of China (promulgated by Standing Comm. Nat’l People’s Cong., Oct. 27, 2005, effective Jan. 1, 2006) § 5 (China), available at http://www.sse.com.cn/sseportal/en/pages/p1075/p1075_content/Companies%20Law%20of%20the%20People’s%20Republic%20of%20China.pdf (including specific corporate governance section in new Chinese companies law).

literature.³⁹ In particular, it includes the peculiar concept of cumulative voting, drawn from U.S. corporate law textbooks.

Early legal origins literature had identified the presence of certain “anti-director” mechanisms, such as cumulative voting, as indicative of effective company level corporate governance.⁴⁰ Statutory cumulative voting originated in the United States as a procedural mechanism designed to enhance minority shareholder representation at the board level, in the absence of charter or statutory provisions on direct representation. According to Jeffrey Gordon at Columbia Law School, in the United States, its “application to shareholder voting is a path-dependent historical oddity.”⁴¹ Cumulative voting is a procedural voting mechanism, and a cumbersome one at that,⁴² under which minority shareholders have a chance (but only a chance) for some degree of representation on the board of directors.⁴³

Although cumulative voting might be moderately useful in achieving its purposes in a corporation with a small number of shareholders, or one with another form of concentrated ownership, in such cases there are usually better mechanisms available.⁴⁴ Most importantly though, cumulative voting would never deliberately be used in a listed company in the United States (it does not work), and is not an indicator of good corporate governance at all.⁴⁵ In the immediate aftermath of the Asian financial crisis

39. *See id.* (discussing indicia of investor protection).

40. *See supra* note 26 (discussing indications of effective company level corporate governance).

41. Jeffrey N. Gordon, *Institutions as Relational Investors: A New Look at Cumulative Voting*, 94 COLUM. L. REV. 124, 142 (1994). The accepted story of the introduction of cumulative voting in the United States is truly a bit bizarre:

As part of the Illinois constitutional revision of 1870, adherents of proportional representation won a major battle to require cumulative voting for the Illinois House of Representatives. The principle having prevailed, the constitutional convention also required cumulative voting in the election of directors for private corporations. The objective was to protect minority interests against overreaching by a majority, particularly in circumstances in which representation on the board would give the minority the information necessary to police against fraud.

Id.

42. *See* ROBERT W. HAMILTON & JONATHAN R. MACEY, *CASES AND MATERIALS ON CORPORATIONS* 534 (8th ed. 2003) (“One undesirable aspect of cumulative voting is that it tends to be a little tricky. If a shareholder casts votes in an irrational or inefficient way, he may not get the directorships his position entitles him to; when voting cumulatively it is relatively easy to make a mistake in spreading votes around.”).

43. For a historical analysis of cumulative voting, see Gordon, *supra* note 41.

44. For example, shareholder agreements and the use of voting groups.

45. The inclusion of cumulative voting in the legal origins literature as “anti-director” indicia is an example of how the legal origins literature got the law wrong.

and at the urging of Washington advisors, Korea has had several unhappy experiments with cumulative voting.⁴⁶

The inappropriateness of dropping OECD Principles 1999 into China in 2001 is pretty obvious, as would be the utilization of a Cadbury-style corporate governance code developed for the commercial environment in the modern City of London. Equally, by 2006, serious questions were arising as to the legal origins literature and its indicia, such as cumulative voting.

It appears that the Chinese were deliberately adopting at least the semblance of the prevailing corporate governance orthodoxy, so as to take advantage of a signalling effect to international capital markets. U.S. institutional investors recognized the signal, which means the domestic market has become aware of and taken up the corporate governance debate.⁴⁷ The existence of a corporate governance code purporting to be in accordance with “commonly accepted standards in international corporate governance” and the availability of cumulative voting were like little red flags attracting the momentary attention of the international capital markets. However, as an effective mechanism of promoting better governance in the corporate sector domestically, they were irrelevant.

In addition to invoking the signalling effect, there may also have been a certain amount of gaming of the corporate governance ratings exercises. The OECD Principles 1999, the revised 2004 Principles, and the legal origins indicia figure prominently in the context of the FSAPs conducted by the IMF and the World Bank, as well as in various privately conducted corporate governance rating exercises. Curtis Milhaupt and Katharina Pistor recount an anecdote about Chinese companies law reforms designed to score points and improve ratings in these exercises.⁴⁸

Here is where the capital markets may, ironically, be producing a perverse effect on corporate governance initiatives. International capital mar-

46. For a more extensive description of experiments with cumulative voting in Asia, see Jordan, *supra* note 20; see also Jordan, *supra* note 32.

47. The author participated in a “road show” meeting in New York City in 2002 where the Sao Paulo Stock Exchange (BOVESPA) was making a presentation to major U.S. institutional investors on its new corporate governance board, the Novo Mercado. One institutional investor inquired as to whether Brazil had cumulative voting provisions in its corporate law (it did not). What the investor failed to realize, and what the BOVESPA failed to mention, was that pending legislation in Brazil was to provide a mechanism for direct board representation by minority shareholders holding a certain percentage of shares, in fact, a much better, substantive right than a cumulative voting mechanism. For a more detailed description of the Novo Mercado, see Jordan & Lubrano, *supra* note 31, at 341.

48. See CURTIS J. MILHAUPT & KATHARINA PISTOR, LAW AND CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD 248 n.18 (2008) (“We were amused by a scholar from Beijing who began a presentation about China’s new Company Law by highlighting the fact that it scores significantly higher on the investor protection index of La Porta et al. than the law it replaced. But he noted a bit wistfully that the index had been recently updated and that the new law would no longer score as high.”).

kets have been so dominated in recent years by Anglo-American law and practices that the spill-over into other law and practice, regardless of legal tradition, has been inevitable. Some spill-over may be ineffective because the mechanisms introduced are incompatible with or unknown to the underlying legal system—fiduciary duties for example. In other cases, the transplanted legal concepts may contradict civil or commercial code provisions. The newly introduced elements may then be simply trumped, rendered ineffective, by older civil code (or even constitutional) provisions which are higher in the legal hierarchy. In the case of China, ineffective or irrelevant corporate governance mechanisms are likely being adopted as a means of signalling to the international capital markets and engaging in the corporate governance rating game.

B. *Germany—Corporate Governance as Political Gesture*

Some corporate governance mechanisms, voluntary codes possibly among them, may in fact be detrimental to developing better corporate governance. Deliberately introducing an ineffective, but internationally recognized, corporate governance delivery mechanism such as a voluntary code may permit political interests to divert attention from approaches which could be more effective, but also more disruptive to the cozy corporate and political status quo.⁴⁹ Such strategies are not restricted to developing economies.

The German corporate governance code, introduced in 2002, provides an example. Justice Minister Herta Daubler-Gmelin “argued that while the code contained no sanctions for non-compliance, ‘the capital market will provide very effective sanctions’ for those that chose to ignore it.”⁵⁰ A voluntary code, introduced not by industry, but by government initiative, in one of the leading European codal countries. The *Financial Times* editorial writer was skeptical at the time of introduction of the voluntary code, stating flatly that it would do “little to nudge German corporate governance towards a more investor-friendly model.”⁵¹ This skepticism was borne out by subsequent events; three years later the voluntary code

49. See Rajan & Zingales, *supra* note 22.

50. See Sven Clausen & Hugh Williamson, *Berlin Announces Voluntary Business Code*, FIN. TIMES, Feb. 27, 2002, at 7 (discussing Germany’s announcement of voluntary business code); see also Jordan & Lubrano, *supra* note 31, at 327.

51. See Editorial, *German Takeover*, FIN. TIMES, Feb. 27, 2002, at 12 (“Common rules for corporate takeovers have become a test for Europe’s capacity to reform itself. Thanks to the conservatism of German business and the refusal of the Berlin government to look beyond narrow political interests, is one that Europe is likely to fail. Despite the eye-catching call for greater disclosure of executive pay, Germany’s new voluntary code, published yesterday, does little to nudge German corporate governance towards a more investor-friendly model.”); see also Jordan & Lubrano, *supra* note 31, at 327.

was considered “a failure” and plans were afoot to replace it with written legislation.⁵²

It is likely that in introducing a voluntary code of corporate governance at the time that it did, Germany too was signalling—not to the international capital markets—but rather to its neighbors in the European Union, that it would engage in the corporate governance dialogue. German interests in protecting Volkswagen from unwanted takeover attempts had been credited with the defeat of the then proposed Takeover Directive in the European Parliament. It had taken nearly thirteen years for the proposed Directive to make it as far as the Parliament, where its approval had been more or less taken for granted. The wasted time and effort was a source of much criticism directed towards Germany. So it is possible to speculate that the speedy subsequent introduction of this corporate governance code was an attempt to make amends. That the voluntary code would likely change little in the political and commercial status quo may have been a collateral advantage.

C. Italy—Inadvertent Chaos

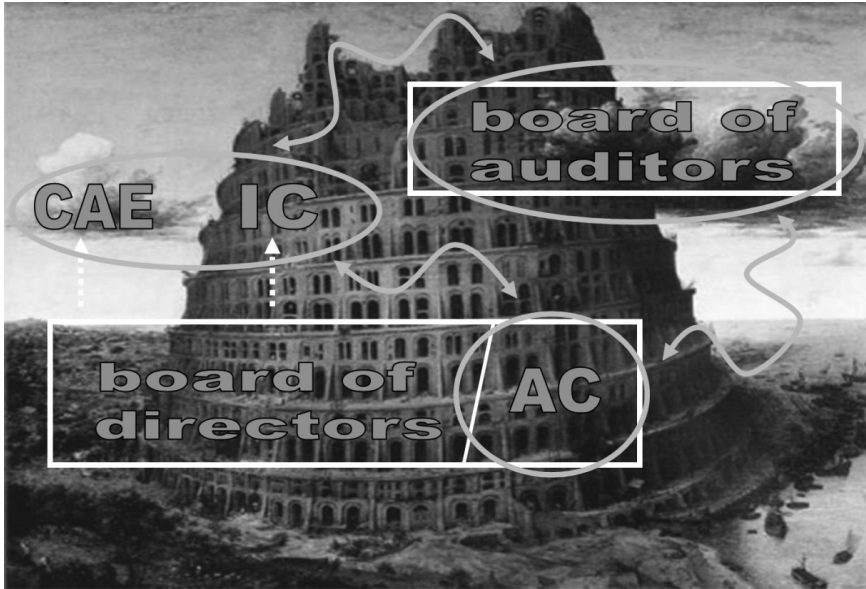
There is certainly reason to believe that, for different reasons, both China and Germany were advertently making use of the implementation of various internationally recognized corporate governance mechanisms in a calculated manner. Italy, on the other hand, was engaging in a somewhat uncoordinated flurry of legislative and other activity in response to the debates raging internationally on corporate governance. Alternative models of corporate governance were being created under Italian law. According to Federico Ghezzi and Marco Ventruruzzo at Bocconi University in Milan, by 2006 Italy was experiencing both “the good and evil of the ‘globalization’ of corporate governance.”⁵³ The result, according to Ghezzi and Ventruruzzo, was a “Tower of Babel.”⁵⁴

52. See Patrick Jenkins & Hugh Williamson, *Executives Under Pressure on Pay*, FIN. TIMES, Jan. 19, 2005, at 16 (“A group of 21 Social Democrat members of the German parliament will today table a draft bill to force company executives to disclose details of their remuneration and bring to an end a deep-rooted culture of secrecy in the country’s boardrooms. The bill, drafted in consultation with corporate governance expert Theodor Baums, comes in response to what the legislators see as the failure of a three-year-old voluntary code to prompt disclosure.”).

53. See Federico Ghezzi & Marco Ventruruzzo, Presentation to The World Bank: Boards of Directors and Audit Committees in Italian Listed Corporations (Feb. 22, 2006) (on file with author).

54. *Id.* at 2.

TOWER OF BABEL ILLUSTRATION⁵⁵



Italy presents a striking illustration of the collision of Anglo-American corporate governance mechanisms with a continental European legal system, and the potentially deleterious results of indiscriminate mixing and matching of legal concepts drawn from very different systems and contexts. Again, according to Ghezzi and Ventruruzzo, duplicative and conflicting rules in certain areas generated uncertainty. The “agency problem” addressed by Anglo-American corporate governance mechanisms was different in Italy (as it is different in many other places in the world); because of the predominance of majority, often family, controlled businesses, the problematic relationship was between majority and minority shareholders, not managers and widely dispersed shareholders. There was a culture of weak institutional investors. The legislative and other corporate governance initiatives in Italy were producing neither top down harmonization nor effective regulatory competition. All in all, according to Ghezzi and Ventruruzzo, “a recipe for disaster.”⁵⁶

VII. CADBURY TWENTY YEARS ON

Twenty years later, the debate on corporate governance struggles on, somewhat overshadowed by the global financial crisis, but relatively undiminished. The legal origins literature has been subjected to serious scrutiny, and is, to all extents and purposes, dead. “While follow-up papers

55. Which they illustrated very cleverly. *Id.*

56. *See id.* at 26 (examining legislative and other corporate governance initiatives in Italy).

recently appeared that use more refined indices to support the link from legal origins to investor protection to finance postulated in LLSV [the legal origins literature] . . . the collapse of the results that inspired this entire line of research is at least remarkable.”⁵⁷

The Cadbury Report itself has spawned dozens of voluntary codes of corporate governance in countries around the world.⁵⁸ Its “comply or explain” implementation methodology pops up everywhere. Many of these codes are easy “show” pieces of no practical import. However, in other places the corporate governance debate spurred real innovation and change, for example, in Brazil, with the Novo Mercado, or Corporate Governance Listing Board.⁵⁹

A. *OECD Principles*

The OECD learned from its experiences with the OECD Principles 1999. Five years later, the Revised OECD Principles of Corporate Governance (2004) (the “Revised OECD Principles 2004”) appeared. Importantly, the Revised OECD Principles 2004 move from the proposition that there is “no single model of good corporate governance.”⁶⁰ The Revised OECD Principles 2004 are more nuanced and balanced, reflecting the lessons learned through their implementation in the course of the IMF/World Bank FSAP exercises and the OECD’s own regional corporate governance roundtables. They are expressive of the reality and variety of corporate experience. Tellingly, there has been no pressing need for subsequent revisions.

However, a second complementary set of OECD Principles appeared in 2005 dealing with the corporate governance of state-owned enterprises. In the course of the FSAP exercises, the prevalence of state-owned enterprises (in both developed and developing economies) and the corporate

57. Holger Spamann, “Law and Finance” Revisited 3 (Harvard Law Sch. John M. Olin Ctr. for Law, Econ., & Bus., Discussion Paper No. 12, 2008), *available at* http://www.law.harvard.edu/programs/olin_center/fellows_papers/pdf/Spamann_12.pdf.

58. *See Index of Codes, supra* note 26 (listing national corporate governance codes and reports).

59. The introduction of the Novo Mercado premium listing board in 2001, with its novel investor protection mechanisms, appears to have had a direct impact in stimulating Brazil’s then moribund capital markets. Between 1996 and 2000, there had been only three IPOs on the BOVESPA. In 2007, there were sixty-four and between 2004 and 2011, the great majority of them have occurred on the Novo Mercado. The average capital raised by offerings in the three years to 2007 was BRL764 million, compared to BRL3.15 *billion* between 2008 and 2009. *See* Patrícia Pellini, Issuer Regulation & Guidance Manager, BM&FBovespa, Presentation at the Latin American Roundtable on Corporate Governance: Stock Exchanges as an Engine for Corporate Governance Improvements (Nov. 30 2011), *available at* <http://www.oecd.org/dataoecd/61/17/49287485.pdf> (discussing these statistics).

60. *See* ORG. FOR ECON. CO-OPERATION & DEV., OECD PRINCIPLES OF CORPORATE GOVERNANCE 13 (2004), *available at* <http://www.oecd.org/corporate/corporateaffairs/corporategovernanceprinciples/31557724.pdf> (moving away from proposition that there is “no single model of good corporate governance”).

governance challenges that they present became glaringly obvious. The OECD Principles 1999, based as they were on a primarily U.S. model of the corporation, were inadequate to address the questions raised in the presence of state-owned enterprises. To its credit, the OECD surmounted ideological reticence in some quarters,⁶¹ to study and formulate guidelines for corporate governance of state-owned enterprises.

B. *United States*

In the United States, despite a lively transatlantic dialogue on corporate governance, there was no single phenomenon comparable to the Cadbury Report. Partly this is due to the complexity of the corporate and legislative environment and the multitude of competing voices. Listing rules, industry practices and organisations, a heavy federal regulatory apparatus overlaying state incorporation statutes and judiciaries, the presence of vocal and powerful institutional investors such as CalPers, and iconic personalities such as the Sage of Omaha,⁶² all play a part in the cacophony on corporate governance. Then in 2002, the Sarbanes-Oxley Act was enacted, which was the first major piece of federal “corporate governance” legislation in decades. Interest in voluntary codes of corporate governance never took root. The debate on corporate governance, and how best to promote it, grinds along nevertheless with shareholders persistently pushing and straining for purchase on a sometimes barren and rocky landscape.

In 2010, the New York Stock Exchange commissioned yet another report on corporate governance.⁶³ From the introductory comments, it is obvious that it did so reluctantly, seeing no compelling need to reopen issues which had already been quite exhaustively explored in the previous decade. The global financial crisis however prompted reconsideration of a wide variety of issues, corporate governance among them. The conclusion was that the “current governance system generally works well.”⁶⁴ In a nod to more modern sensibilities regarding stakeholders though, it did state that the fundamental objective of corporate governance was to promote “long-term sustainable growth in value for shareholders and, by extension, other stakeholders.”⁶⁵ Thus, a powerful institution gave explicit

61. *See generally* ORG. FOR ECON. CO-OPERATION & DEV., OECD GUIDELINES ON CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES (2005), *available at* <http://www.oecd.org/dataoecd/46/51/34803211.pdf> (noting that United States did not participate in formulation of 2005 OECD corporate governance guidelines). It is somewhat ironic that barely three years later the United States would be home to a number of very large state-owned enterprises, such as General Motors.

62. Warren Buffett.

63. *See generally* N.Y. STOCK EXCH. COMM’N ON CORPORATE GOVERNANCE, REPORT OF THE NEW YORK STOCK EXCHANGE COMMISSION ON CORPORATE GOVERNANCE (2010), *available at* <http://www.nyse.com/pdfs/CCGReport.pdf> (providing comprehensive review of corporate governance principles).

64. *Id.* at 32.

65. *Id.* at 25.

acknowledgement that shareholder wealth maximization was not the only benchmark against which to assess corporate decision-making.

C. Germany

In Germany, there is a new Corporate Governance Code 2010 (the “German Code 2010”), which reverts more to form.⁶⁶ Much of this German Code 2010 is a restatement of existing statutory law, indicative of the German conviction that corporate governance is, for the most part, adequately dealt with in existing legislation. The German Code 2010 applies only to German incorporated public, listed companies, and therefore avoids the unfortunate (from a European perspective) extraterritorial reach of the U.S. Sarbanes-Oxley 2002 corporate governance legislation. The Code reaffirms the iconic German dual board structure and principle of co-determination (worker representation on the supervisory board). The Cadbury Report though continues to exercise its pervasive influence; there are “supplementary” provisions, indicated in the German Code 2010 by “shall” terminology. In these cases, the “comply or explain” methodology of Cadbury is invoked. Additionally, there are some provisions that are suggestions only, thrown in for good measure.

D. European Union

At the EU level, a new window is opening on the international discourse on corporate governance. For much of the last twenty years, given the dominance of Anglo-American voices in the corporate governance debate, at the pan-European level, Europe has struggled to play catch-up. Certainly, voluntary codes of corporate governance popped up all over Europe. Stock exchanges, ever in conversation with one another, picked up on various listing rule initiatives (and “comply or explain”). Legislative initiatives flowing from the Sarbanes-Oxley 2002 corporate governance legislation in the United States were tried out at the EU level, with mixed results.⁶⁷

More lately though, as experience with corporate governance techniques has grown, uniquely European approaches have been developing. At the member state level, a multitude of legislative “fixes” have been put in place, many of which would be unthinkable in the United States and controversial, to say the least, in the U.K. For example, supported by em-

66. See generally GOV'T COMM'N, GERMAN CORPORATE GOVERNANCE CODE (2010), available at http://deutsche-boerse.com/dbg/dispatch/en/binary/gdb_content_pool/imported_files/public_files/10_downloads/14_investor_relations/15_corporate_governance/DCGK_mai_2010.pdf (presenting essential statutory regulations for management and supervision of German listed companies and containing internationally and nationally recognized standards for good and responsible governance).

67. A proposal for mandatory audit committees for European public companies (inspired by Sarbanes-Oxley 2002) and floated by the European Commission in Brussels was defeated at the European Parliament.

pirical evidence on firm performance and psychological studies indicating the value of diversity, especially gender diversity, in decision-making, a mandatory percentage of women on corporate boards is now required in some member states⁶⁸ and is being contemplated at the EU level.⁶⁹

Last year, in 2011, a provocative EU Green Paper on Corporate Governance (“Green Paper”) appeared, eliciting a spirited response from the Committee of Company Law Experts composed of Paul L. Davies (University of Oxford), Klaus J. Hopt (Max Planck Institute for Comparative and International Private Law; European Corporate Governance Institute (ECGI)), Guido A. Ferrarini (University of Genoa; ECGI), Alain Pietrancosta, (Sorbonne Law School), Rolf R. Skog, Stanislaw Soltysinski (Komisja Kodyfikacyjna Prawa Cywilnego; Sołtysiński Kawecki & Szlęzak, Legal Advisors), Jaap W. Winter (Duisenberg School of Finance; De Brauw Blackstone Westbroek), and Eddy Wymeersch (Ghent University; ECGI). Demonstrating the persistence and continuity of the Cadbury Report in the modern corporate governance dialogue, the Green Paper opens with the Cadbury Report definition of corporate governance: “Corporate governance is traditionally defined as the system by which companies are directed and controlled and as a set of relationships between a company’s management, its board, its shareholders and its other stakeholders.”⁷⁰

But from there on, much is new in this wide-ranging and thought provoking study. The earlier knee-jerk reliance on the Anglo-American corporate governance framework that Cadbury initiated has been replaced by the search for principled approaches that would work in a European environment. The Green Paper proceeds from the premise that the EU is inherently international and diverse. It notes that the corporate gov-

68. See Yvonne Roberts, *You’re Fired*, GUARDIAN (Mar. 6, 2008), www.guardian.co.uk/lifeandstyle/2008/mar/06/women.discriminationatwork (noting that Norway’s 2003 amendment to Public Limited Liabilities Act No 45/1997 (1997) (Nor) § 6-11a introduced 40% quota that was to be phased in by 2008). [Law 2011-103 of January 27, 2011, Concerning the Representation of Women and Men on Boards of Directors and of Supervisory Boards and Workplace Equality], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Sept. 21, 2012, p. 3 (discussing French law that recommended 20% of board members be female within three years); see also Daniel Flynn, *France Sets Quota for Women on Big Companies’ Boards*, REUTERS (Jan. 13, 2011), www.reuters.com/article/2011/01/13/us-france-equality-idUSTRE70C5ZA20110113 (discussing French law forcing large companies to reserve at least 40% of boardroom positions for women within six years).

69. See *Green Paper: The EU Corporate Governance Framework*, at 6–7, COM (2011) 164 final (Apr. 5, 2011) [hereinafter *Green Paper*], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0164:FIN:EN:PDF> (discussing issue of gender diversity in economic decision-making); cf. Paul L. Davies et al., Response to the European Commission’s Green Paper “The EU Corporate Governance Framework” 8 (July 22, 2011) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1912548& (discussing whether listed companies should be required to ensure better gender balance on boards).

70. *Green Paper*, *supra* note 69, at 2.

ernance requirements applicable to EU-listed companies have become a mixture of “hard and soft law,” with voluntary codes of corporate governance falling into the latter category. The operation of “hard and soft law” in the commercial law context has garnered a fair amount of recent attention. It is hard not to surmise that the extraordinary proliferation of voluntary codes has been a contributing factor to this surge in interest in the effectiveness of non-legislative norms.

Ultimately though, while acknowledging the presence of much “soft law” in corporate governance, the Green Paper is critical of the “comply or explain” approach associated with the Cadbury Report. “Comply or explain” has not delivered the desired results in crucial areas; it does not necessarily work where it is most needed.

E. *United Kingdom*

And in the U.K., where it all began? The original Cadbury Report of 1992 was not uncontroversial; it was followed by a number of reports and a succession of voluntary codes that picked up on the current issues and debates and grew by accretion. These subsequent codes were somewhat unimaginatively called, in each case, “The Combined Code.”⁷¹ However, in 2010 there was a break in this process with the appearance of two new voluntary codes, the U.K. Code of Corporate Governance 2010 (“U.K. Code 2010”), continuing the tradition of the combined codes, and the brand new U.K. Stewardship Code 2010 (applicable to institutional investors).

Although the U.K. Code 2010 reflects its lineage going straight back to the Cadbury Report (by reiterating its definition of corporate governance), this document is a much different creature. Gone is the two page “Code of Best Practice,” replaced by a detailed and differentiated approach to corporate governance structured along the lines of the OECD Principles 2004.

Of course, a great deal has changed in the U.K. since the Cadbury Report appeared in 1992, most notably a new Companies Act 2006 (U.K.), which at its introduction was touted as the first major rethinking of U.K. companies law in 140 years.⁷² One of the more interesting aspects of this

71. The reports that culminated in the Combined Code were as follows: DIRECTORS’ REMUNERATION, REPORT OF A STUDY GROUP CHAIRED BY SIR RICHARD GREENBURY (1995) [hereinafter GREENBURY REPORT]; COMMITTEE ON CORPORATE GOVERNANCE, FINAL REPORT (1998) [hereinafter HAMPPEL REPORT]; DEREK HIGGS, REVIEW OF THE ROLE AND EFFECTIVENESS OF NON-EXECUTIVE DIRECTORS (2002) [hereinafter HIGGS REVIEW].

72. See Patricia Hewitt, *Foreword* to U.K. DEP’T OF TRADE AND INDUS., COMPANY LAW REFORM 3 (2005) (“Britain was among the first nations to establish rules for the operation of companies, and our law remains a model for many nations overseas. . . . [O]ver time the law can become outdated, and risks presenting obstacles to the ways companies want and need to do business in today’s world. We are determined to avoid this. That is why we established the Company Law Review . . .”).

new legislation is the statutory statement of directors' duty of care,⁷³ which enumerates the considerations that must be taken into account in the decision-making process. This long list of considerations, which includes the interests of employees and creditors for example, demonstrates the impact of stakeholder theory (and likely continental European perspectives) and captures many of the considerations detailed by Kenneth Scott in his definition of corporate governance.

In addition to a new Companies Act, there are more EU level legislative instruments that must be taken into consideration. In the last decade, the EU has been churning out Directive after Directive affecting public and listed companies. The EU imperative is now even stronger, given that it has turned to the use of regulations (of immediate and direct application in member states) rather than Directives implemented at the member state level in their own fashion. The result in the U.K. has been a much greater interaction of older style British approaches (informed by centuries of self-regulation and industry standards of behavior) with "hard law." But the U.K. Code 2012 still relies on the "comply or explain" methodology of the voluntary code of corporate governance, with little indication of a move away from it. Last year, the Financial Reporting Council (FRC) the monitoring agency for the two new codes, the corporate governance code and the stewardship code, released a one-year update on their implementation.⁷⁴

73. See Companies Act, 2006, c. 46, § 172 (Eng.) (listing section on duty to promote success of company).

- (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
 - (a) the likely consequences of any decision in the long term,
 - (b) the interests of the company's employees,
 - (c) the need to foster the company's business relationships with suppliers, customers and others,
 - (d) the impact of the company's operations on the community and the environment,
 - (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
 - (f) the need to act fairly as between members of the company.
- (2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company

Id.

74. See generally FIN. REPORTING COUNCIL, DEVELOPMENTS IN CORPORATE GOVERNANCE 2011: THE IMPACT AND IMPLEMENTATION OF THE UK CORPORATE GOVERNANCE AND STEWARDSHIP CODES (2011), available at <http://www.frc.org.uk/getattachment/5f4fada9-2a88-43a4-bbec-be15b6519e79/Developments-in-Corporate-Governance-2011-The-impact-and-implementation-of-the-UK-Corporate-Governance->

In a poke at the more European (and perhaps American) approaches to corporate governance, the FRC noted the “advantages this [U.K. code-based approach] has over slower-changing law-based systems,” in particular, its responsiveness to a rapidly changing business environment.⁷⁵

As in the past with the various iterations of the Cadbury Report, the U.K. Code 2010 will continue to be a “work in progress” subject to continuous tinkering and fine-tuning. However, the FRC did state in its 2011 report that it intended to leave the code alone for the next year or two so as to let it settle in.⁷⁶

VIII. CONCLUSION

So the legacy of the Cadbury Report lives on in the U.K. with no diminution in the appeal of its voluntary code and its comply or explain approach to corporate governance. But there are several clouds looming on the horizon. Comply or explain and voluntary codes of corporate governance appear to have run their course elsewhere in the world. Even in the U.K., legislative initiatives on the corporate governance front, either domestically initiated or EU-driven,⁷⁷ may be sapping the voluntary code of its vitality. Although the conviction remains strong in the U.K. that the flexibility and opportunity for easy, rapid adjustments are strengths of the voluntary code approach to corporate governance, the constantly evolving nature of the U.K. voluntary codes may, in fact, be an indication of a deep-rooted problem: Are these voluntary codes of corporate governance, which give so much deference to industry sentiment and conventional wisdom, in a constant state of flux because they are not getting it right?

and-Stewardship-Codes.aspx (drawing on new and publicly available research, study of annual reports and Stewardship Code statements, and many conversations with companies, investors and other interested parties).

75. *See id.* at 1.

76. *Id.* at 3.

77. Especially, given the increasing use of directly applicable EU Regulation of a more insistent, mandatory nature.