Introduction

Corporate governance issues have received a considerable amount of attention worldwide. For decades, academic studies and articles have been dedicated to specific corporate governance issues. Recently, an ever increasing number of books have examined the subject in the aftermath of the global financial crisis. This growing interest in the subject reflects the concept’s richness which now covers a broad range of disciplines including management, organizational behaviour, economics, law and sociology. Businesses are constantly adapting to cope with the increasing demands of their shareholders to find satisfactory governance solutions compatible with businesses’ need to remain competitive. Many professional organizations have been created at the local and regional levels to contribute to the analysis of governance issues faced by businesses and to the implementation of solutions to these issues. An entire cottage industry, including proxy agencies and governance assessment bodies who regularly publish corporate governance surveys, has developed. At the international level, the OECD, the World Bank and the International Monetary Fund have played crucial roles in offering guidance for action by developing nations. Actors who formerly avoided the world of business, such as NGOs, have also made their voice heard to influence corporate governance and try to improve the behaviour of their leaders. What are the drivers of the heightened attention which corporate governance has received in recent years?

CORPORATE GOVERNANCE’S ORIGINS AND EXPANSION

The expression ‘corporate governance’ became popular in the 1980s. The origins of the term may be traced to Richard Eells’ studies (Eells 1960; Fischel 1982; Veasey and di Guglielmo 2005), two decades earlier. Corporate governance encompasses several characteristics which distinguish it from other modes of governance. There are at least three major features that need to be highlighted. It is a private mode of governance by opposition to public governance; it is of a capitalistic nature as opposed
Comparative corporate governance

to other private modes of governance such as associations, private funds or even cooperative corporations; it largely involves all of ‘those who exercise control over the company thereby making significant decisions: human resources management, R&D and strategic choices, mergers and acquisitions, pricing and marketing, risk management, regulatory affairs, etc.’ (Tirole 2016). In less than 50 years, it has become the dominant form of corporate management worldwide.

Corporate governance has a long-standing history, even before the term itself was coined. The first big debates go back to the beginning of the twentieth century with the emergence of large business corporations and the questions that arose on their nature and role in society. The first traditional approach on corporate governance issues dates back to 1932 with the publication of Adolf A. Berle and Gardiner Means’s The Modern Corporation and Private Property, a reference work that described how the balance of powers in corporations was progressively modified, with the dispersion of shareholders, ignorant of the conduct of the business, incapable of, and largely uninterested in exercising effective control over corporate executives. Berle and Means showed how the separation of ownership and control had become the dominant feature distinguishing large corporations from family-owned companies in the United States. This fundamental change precipitated the development and propagation of standards to induce best practices aimed at providing proper checks and balances within large companies.

The primary theoretical basis for these changes was Agency theory. This theory aims to correct the imbalance born from the asymmetry in information available to shareholders and managers, by introducing some rules and standards designed to foster transparency and the alignment of the interests of both sides. It initiated a movement to reform corporate law and make corporate practice more effective, to provide greater monitoring to shareholders, which later became known as the ‘shareholder primacy model’. Shareholder primacy theory, relayed by the ‘Chicago School’ (Coase 1937), and its followers (Jensen and Meckling 1976) had a large echo in academic circles. Later known as ‘Law and Finance’ or ‘New Comparative Economy’ (La Porta et al. 1997), a comparative approach was finally introduced to accompany the previous financial and economic focus. It was intended to determine whether there was a correlation between law and markets, and more specifically between the legal framework of a given country and the development of its financial system. In the Weberian tradition, La Porta, Lopez de Silanes, Shleifer and Vishny (hereinafter LLSV) established a positive relationship between the quality of a given legal framework governing investor protections, namely, the level of protection afforded to investors
on the basis of membership in a particular legal system, and the
development of financial markets. In a series of articles, LLSV argued
that the common law system best protected investors and attempted to
demonstrate that Anglo-American legal systems, based principally on
strong self and weak public regulation, fostered economic growth (La
Porta et al. 1997; LLSV 1998). These authors advocated adopting a
coherent and unique approach to corporate governance, giving prec-
edence to a reduction in the role of the state and an enhanced role for the
market.

The shareholder primacy model stills prevails in US corporate practice.
It was gradually extended to a more general development of the market
theory, and this work then constituted the methodological base of a vast
academic literature where the emphasis on aligning the interests of
managers with shareholders became ‘among the most prominent pre-
scriptions in the corporate governance discourse’ (Vasudev, in Vasudev
and Watson 2012). Geographically, it outgrew its national framework and
served as an economic policy that later inspired the World Bank’s
normative approach through its Doing Business reports. Other inter-
national organizations have followed, conferring upon this theory the
legitimacy and recognition necessary for its implementation. The Law
and Finance approach which dominated during the latter part of the
twentieth century helped justify the prominence given to the Anglo-
American model at the international and regional levels. Finally, global-
ization served this doctrine, increasing international pressure towards
convergence.¹ The liberal Anglo-American approach has become truly
hegemonic. It favoured the spread of liberal rules of international finance,
which in turn contributed to the removal of controls and the liberalization
of cross-border capital flows. It facilitated the implementation of a
strategy of international diversification by shareholder value-oriented
institutional investors. But globalization is not just about economy and
finance. It has affected corporate governance regulatory schemes as well.
In the current era of progressive globalization of economic and financial
markets, corporate governance guidelines emerged in the 1990s, based on
the belief that self-regulation was a better method to solve corporate

¹ Convergence has different meanings. It may be purely formal, leading to
the incorporation of a system of corporate governance identified as ‘superior’; it
may also lead to a gradual diffusion and implementation of rules and practices
that lead to a mix of co-existing systems. Here, particular legal innovations may
be transmitted across borders and absorbed by foreign jurisdictions so that the
regulatory techniques employed by different jurisdictions across a whole legal
area become increasingly similar.
governance problems than public regulation (Hart 1995). US/UK based funds’ intervention significantly modified the ownership structure of large listed European companies and they greatly impacted European corporate governance systems. Asian economies and institutions, such as the OECD and the Asian Roundtable on Corporate Governance established in 1999, also favoured the emergence of a corporate governance infrastructure in Asia and a more widespread implementation of the global standards embodied by the shareholder primacy theory. India and to a lesser extent countries such as Japan and Malaysia have been influenced by the recommendations of Western conceptions of corporate governance. Other Asian countries, notably China, have been slower, or perhaps more resistant to change (Milhaupt and Pistor 2008). Letting actors self-regulate themselves in the field of corporate governance has been nothing less than revolutionary for many civil law-tradition legal systems. The worldwide integration of codes of corporate governance in almost all jurisdictions and their well-established recognition in the regulatory landscape marked a radical shift in corporate law and corporate governance systems.

CORPORATE GOVERNANCE FAILURES

Despite this strong attention for corporate governance worldwide, as well as all the effects linked to globalization, paradoxically, it appeared that predictions of legal convergence that authors consistently supported (Hansmann and Kraakman 2001) have not come true. A first explanation of this lack of convergence may lie in the model itself and its fragilities. Most of the time, and rightly so, the global financial crisis has been blamed to explain the questioning of the US governance model. The global financial crisis of 2008–09 has shaken faith in the American model, and with such loss, there was a need to go beyond the corporate governance call for convergence. Indeed, the financial crisis has defied the predictions of authors who thought the period prior to 2008 was ‘surprisingly calm’ and who praised the common law approach ‘to social control of economic performance life’ compared to the civil law approach. The US economy experienced the depths of the worst recession since the Great Depression of the 1930s. The crisis was largely due to excessive financial liberalization which enabled the financial industry to develop complex financial instruments, and in particular derivatives, outside of any control. According to the Nobel Prize-winning economist
Robert Shiller, however, this critical situation was preceded by phenomena as technical and housing bubbles, essentially ‘subtle social-psychological phenomena’ which are ‘signs of irrational exuberance’ among investors and, by their very nature, difficult to control (Shiller 2000). This period was marked by important economic changes, far from the peaceful and serene picture portrayed by shareholder primacy authors. The first response to the financial crisis has been a return to regulation in Western economies, notably the US Dodd-Frank Act which is commonly seen as the most far-reaching Wall Street reform in history, and the establishment of new regulatory authorities (e.g., US Consumer Financial Protection Bureau). In financial matters, the crisis has exacerbated the legalization of finance practices which are no longer specific to the legislative civil tradition, but extend to the United States.

The failures in the US corporate governance model have indirectly and definitely contributed to fostering mistrust and suspicion. One may wonder whether previous collapses, scandals or frauds were not harbingers of corporate governance flaws leading to a profound loss of confidence in markets and encouraging the global financial crisis. The relation between governance and fraud, in particular white-collar offences, is an essential one to grasp. In hindsight, frauds committed by executive officers of major listed companies highlight deeper deficiencies in the governance of private companies. This may result in a questioning of governance rules outside of any serious financial crisis. The Enron and Worldcom frauds marked a decisive turning point in the governance structure of large American companies, which led to the in-depth amending of US federal legislation with the Sarbanes Oxley Act. Europe suffered similar situations. Not long after the Enron and Worldcom scams, the Parmalat scandal in Italy has been described by the US Securities and Exchange Commission (SEC) as ‘one of largest and most brazen corporate financial frauds in history’. This scandal has led to the in-depth reform of Italian corporate governance, with the drafting of the Italian Corporate Governance Code in 2006. Earlier, the United Kingdom had already undergone similar cases. Local financial scandals and the

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2 President Obama’s Wall Street reform law created the Consumer Financial Protection Bureau (CFPB), an independent agency to set and enforce clear, consistent rules for the financial marketplace. The CFPB supervises banks, credit unions among other financial companies and ensures that they are held to high standards.

bankruptcy of three major groups listed on the London market (the Maxwell Group, the Bank of Credit and Commerce International (BCCI) and Polly Peck International (PPI)) triggered awareness. These bankruptcies were all the more spectacular as the concerned companies were apparently performing well. Especially, starting as a small textile company, PPI had long been a success story, as it had expanded rapidly in the 1980s, becoming a constituent of the FTSE index, and with a very significant turnover the year preceding its bankruptcy. These bankruptcies revealed specific leaders’ malfeasance. The information given to the market by these companies had been neither effective enough nor sufficiently controlled to anticipate these failures. These developments raised the issue of a dangerous concentration of control in listed companies. The entire system of corporate governance on the London market was put in question and the legal response following these scandals was the UK Corporate Governance Code first issued in 1992. In other parts of Europe, similar developments occurred, such as the Vivendi and Alstom scandals in France, or Volkswagen in Germany. All these companies had to thoroughly revise their corporate governance structure, effective corporate governance policies becoming a means to prevent unethical or fraudulent behaviours.

If scandals and crisis revealed that governance standards should be questioned, they are not the main explanation for missing the opportunity to make convergence happen worldwide. According to the thesis developed in this book, other causes of a more structural nature are linked to the cultural particularities of national governance systems and may explain this failure to achieve convergence. While the effect of the financial crisis is well-documented, socio-cultural aspects impacting corporate governance practice and hindering convergence are less well known, warranting an explanation, as given below.

SOCIO-CULTURAL ASPECTS OF CORPORATE GOVERNANCE

Beyond corporate governance failures, there may be a structural cause to the absence of convergence among governance models which suggests that this is a long-term trend. This cause is the legal and cultural determinism proper to governance systems. Socio-economic determinism in governance has deep roots, as exemplified by the writings of major philosophers such as Montesquieu (Montesquieu 1748). In legal literature, a new generation of researchers have given precedence to the
institutional context in which corporate governance systems are necessarily embedded and which were largely ignored by previous theoretical models. Adopting a global comparative perspective (Gill 2012; Aguilera and Jackson 2003; 2010; Aguilera et al. 2013) allows institutional, cultural and sociological factors to be considered as relevant determinants of managerial governance issues and encourages the exploration of ‘the implications of possibly strong connections between corporate governance practices and their socio-cultural milieu’ (Gill 2012) or what is called ‘institutional complementarities’ (Aguilera et al. 2013).\(^4\) The first and foremost factor is corporate ownership, which is in turn affected by industrial and political developments. The market-oriented equity culture in the United States has favoured a dispersion of shareholders and a consequent ‘outsider’ system of corporate governance, mainly focused on regulating board duties in takeover situations. On the contrary, the prevalence of concentrated ownership in Europe and Asia has been conducive to an insider governance model.\(^5\) Even more fundamentally, various types of capitalism exist (Albert 1991), with as many corporate governance systems, tightly linked with every facet of economic, politic and legal structures. Each system has ‘its own costs, benefits and vulnerabilities’ (Milhaupt and Pistor 2008). The maintenance of strong local legal cultures illustrates the limits of convergence of governance predicted by theorists who adopted an exclusive economic-based approach. By adopting a legal comparative approach of systems of

\(^4\) According to the authors, national systems of corporate governance are embedded in specific varieties of capitalism characterized by important differences regarding the extent and strength of institutional complementarities: ‘Institutional complementarities are important in liberal market economies (e.g. United Kingdom and United States) and coordinated market economies (e.g. Germany and Japan) … By contrast, institutionally hybrid market economies (e.g. France and Spain) are characterized by the absence of complementarities between the different spheres of the economy, most notably, although not exclusively, reflecting the presence of general/transferable skills and rigid labor market’.

\(^5\) In concentrated ownership, the executives stay under the control of the majority of the shareholders and cannot in any case abuse their trust situation to their own private interest. Among European and many Asian companies, an attached culture of relationships and a concentrated ownership pattern prevail in which, in contrast to dispersed shareholding patterns, regulating board duties in takeover situations may be less relevant (not to say, in some cases, useless, e.g. Germany until the 2000s). In addition, the financial interaction between banks and industry partly justifies, for example, that in order to protect themselves against takeovers, shareholders rely on ownership concentration rather than on the proxy voting of banks.
governance, this book aims to show the dynamic and tensions which exist between convergence attempts and the persistence of local models of governance.

PURPOSE OF THE BOOK

Three main areas of tension in corporate governance legal perspectives will be addressed in the book. The first point of tension exists on a theoretical level, which opposes the shareholder primacy model still defended by most institutional investors worldwide to other models advocating for more participation of large corporations in general economic welfare, social responsibility and the sustainable long-term performance of business corporations. The Rana Plaza scandal, which refers to the collapse of an eight-storey garment factory on the outskirts of Dhaka that killed at least 400 people and injured more than 1,000 on 24 April 2013, the Petrobras scandal in Brazil and recent incidents in India, Japan and Germany illustrate a need for greater discipline in corporate governance systems and a need to better integrate supplier controls and anti-bribery measures into governance. The alternative approach reveals how deeply economic, social and environmental issues are intertwined. These theoretical debates will be discussed in Part I.

A second point of tension exists on a technical regulatory level. Corporate governance systems have experienced a significant legal transition period due to the soft regulation developments enshrined in corporate governance codes and their integration in legal systems. A reasonable balance between state intervention and professional self-regulation must be struck given the continued importance of the role of states in regulating economic and social organizational activities, and the need to promote freedom of private initiatives. The setting up of corporate governance codes with specific self-regulatory tools combined with state action (in their development and modification) has led to a formal ‘hybridization’ of regulatory regimes which has not proven to be fully satisfactory. A mix of regulations of different natures often co-exists within a given legal system. As a new and disruptive normative tool, corporate governance codes have led to a real upheaval in regulatory mechanisms, blurring the dividing line between self-regulation and state regulation. The consequence is a normative complexity which raises issues concerning the scope and effectiveness of corporate governance codes and the existence of various norms within a country’s system of governance. These technical regulatory questions will be addressed in Part II.
Beyond aspects of formal regulatory hybridization, a third point of tension exists on a substantive level. Corporate governance standards are now integrated into pre-existing legal systems worldwide. This integration is not indifferent to the stability of the legal environment as it raises an issue well known to comparatists, that of cross-border transplants. The concept of ‘legal transplant’ implies the movement of rules or institutions. The term is used to describe the movement that rules or institutions may be subject to (in a globalized world), resulting in modulations or changes to the original rule within the new context (Sacco 1991a and 1991b). The scope of such legal transplants is threefold (Le Goff and Pierre Nora 1974; Spamann 2009a and 2009b; Normand 2011). The transplanting of a given foreign institution into a different legal system may result in the full integration of the rule or institution into the receiving system, so much so that it loses its essential features and becomes subjected to the legal framework and categories of the new system (transplanting by integration). Full integration is mostly observed when the diffusion of substantive legal materials occurs inside the same legal family, either common or civil law system. Conversely, the introduction of such an institution or rule into a different system may produce significant change in the receiving system itself and, in turn, may result in the setting aside of the receiving system’s fundamental legal categories (transplanting by assimilation). Assimilation is mainly observed when the diffusion of substantive legal material moves from one legal family to another. Between these two extremes, such an institution may also integrate into the receiving system while transforming it partially. In the latter case, it will adopt characteristics from both systems (transplanting by hybridization). The latter type of acculturation highlights the cross-breeding of legal systems (Turgeon 2002) which is particularly significant in corporate governance. The concept of legal transplant therefore conveys a specific comparative approach. As Max Weber wrote:

[a] comparative study [sh]ould not aim at finding ‘analogies’ and ‘parallels’, as is done by those engrossed in the currently fashionable enterprise of constructing general schemes of development. The aim should, rather, be precisely the opposite: to identify and define the individuality of each development, the characteristics which made the one conclude in a manner so different from that of the other. This done, one can then determine the causes which led to these differences. (Weber 1909)

The different types of acculturation are ever-present when studying comparative corporate governance and the difficulties in relation to corporate governance transplants are numerous. They come with the translation of concepts and with their insertion in an appropriate place (in
particular regulation or soft law), as well as with the role they play in the host legal system. Transplanting corporate governance standards requires careful adaptation (Watson 1993; Spamann 2009a and 2009b). A regulatory technique can be a successful economic tool in a given national context but a counterproductive one in another. Transplants, such as rules or norms related to conflict of interests, ‘independent directors’, board diversity or executive remuneration, require thoughtful reflection prior to their imposition. Owing to the economic, societal and cultural environment of a given country, the ‘path-dependent’ developments in corporate governance systems are of very great importance (Bebchuk and Roe 1999). The risk of grafting disruptive legal transplants into models of corporate governance exists. Consequently, contextualizing corporate governance remains indispensable to allow for a better understanding of corporate governance. These transplanted standards will be studied in Part III.

CONTENT OF THE BOOK

This book takes a broadbrush approach to the study of corporate governance focusing on its comparative and legal aspects. The depiction of the socio-cultural environment of all corporate governance systems worldwide cannot be attempted for obvious reasons of length and complexity. Rather, the comparison is limited to the main systems of corporate governance: the United States, the European Union and the ‘parent’ representative systems among the EU Member States: the United Kingdom (now separate from the Member States since its withdrawal from the EU), France and Germany. Asian systems, specifically Indian, Chinese, Japanese, Korean and Malaysian corporate governance peculiarities, are briefly addressed. Among corporate governance systems, the book does not analyse all types of corporations. Rather, it focuses on large listed companies and their corporate governance systems, in a globalized context presenting higher complexity than middle or small-sized companies. Financial, economic and managerial, especially organizational, issues and research, are alluded to when necessary. But this comparative study focuses on legal aspects consistent with the belief that corporate governance is an integral part of general corporate law which itself reflects the larger cultural environment of a given legal system. It seeks to find the individuality of each corporate governance system and determine the cause leading to differences, rather than to expose uncertain convergence trends. The book is divided into three Parts consistent with the three points of tension presently undermining the
coherence of legal systems of corporate governance. The first Part considers legal corporate governance models focusing on the ideological tensions between the two schools reflected in academic literature, and in international, regional and national frameworks. The second Part focuses on the formalization of corporate governance standards as regulatory tools and governance codes, and the ‘hybridization’ within legal systems resulting from this dynamic interplay between hard and soft law. The third Part comprises a substantive study of corporate governance standards highlighting the phenomenon of legal transplants.