

Preface

The thesis of this book argues that national corporate governance is extremely important for societies. Recently many scholars have said that a convergence of corporate governance is inevitable. We believe that this is true, but as Mark Twain said, ‘the reports of my death are greatly exaggerated’. We show that although there is some convergence, national law of corporate governance is thriving. We also believe that it is necessary for the identity of each country. The reason that national diversity in corporate governance is still widespread is because of the history, philosophy and economy of each country as shown in its cultural heritage, and which gives its identity. The cultural heritage in each state is identifiable in the company law and corporate governance codes. We consider that this is crucial for the well-being of democratic nations. Convergence in corporate governance is a threat to ordered commercial regulations because of the power of the pre-eminent economic paradigm in the West which is the neo-liberal model. The neo-liberal agenda that predicates deregulation, privatisation and the liberalisation of markets is moulding many jurisdictions into an Anglo–American model of corporate governance which is dangerous for a number of reasons:¹

- It is an extreme sort of utilitarianism without significant ethical principles.
- It allows the growth of mega-companies backed by powerful international institutions including the International Monetary Fund (IMF), the World Bank (WB), the Organisation for Economic Co-operation and Development (OECD) and the World Trade Organization (WTO).
- It changes the balance of power between states, individuals and countries and the mega-companies, including the financial sector (‘the markets’) and the international institutions.
- It is disastrous because of the burgeoning inequality between nations and individuals.

¹ Talbot, L., *Progressive Corporate Governance for the 21st Century* (Routledge, Abingdon 2013).

- It is profoundly anti-democratic because of the powerful actors.
- It is disastrous for the environment.

Against the power of large companies, multinational companies (MNCs) and the financial institutions, national policy-makers are disadvantaged because of the imbalances. Chapter 1 is concerned with global issues emerging from the pre-eminence of the neo-liberal agenda. Corporate governance matters because of the sort of society that each state wants. Imbedded in each nation's issues of board structures and general meetings is the whole structure of the economic management in the country. Western capitalism is always a compromise between ethical principles and pragmatism, God and Mammon, God against the Devil. We will consider in each section the tensions between these concepts in corporate governance. Modern discourse uses different words to express a concept of God. We use terms like human rights, corporate social responsibility, ethical principles, communitaire, sustainability, democracy, public interest or bona fide. On the other side there are terms like efficiency, growth, development and necessity. In each chapter of our book we highlight the tension between these powerful ideas and the compromises that policy-makers have made in different jurisdictions to reach a balance between them. We contemplate the neo-liberal paradigm as a rigid contractual model for an economic system unable to imagine the value of real equality rather than simulated equality, leading to significant consequences. A rigid contractual model will always involve significant advantages for the powerful unless law or regulation can rebalance the equation. The neo-liberal prescription involves a number of crucial tenets, including rigid interpretation of property rights and ownership. In Chapters 1 and 2 we show how important these tenets are, although these concepts can be reinterpreted in a different light depending on the historical and philosophic foundation of each nation. We show that property rights and ownership are chameleon-like constructs; the definition of ownership and property rights depends on whether there a rigid interpretation of these terms, which allows special interests to flourish, or a looser interpretation which allows ethical and communitaire ideas to flourish in corporate governance.

In Chapter 5 we consider the German political consensus model which allows a common understanding of the interests of the community including companies. The opposite theory is the neo-liberal model which is predicated on contract which is rigidly contractual. We assess the differences first in Chapter 1 where the different definitions of property rights are starkly exposed when the Indians lost their lands, but throughout the book it pervades all aspects of corporate governance. The

stakeholder versus the shareholder debate is about ethical principles versus profit, and the ownership of companies is part of this argument. The German consensus of politics is about the ownership of the 'commons', a public interest concept which has resonance in corporate governance. On the other hand the individualism of the American political system with its rigid adherence of property rights is a reason why maximisation of profit is a key part of corporate governance in the US. In the UK there is an uneasy compromise between neo-liberal corporate governance and a stakeholder model embedded in the Companies Act 2006, section 172 where there is a fig leaf for stakeholders other than shareholders. Throughout the book we show these tensions between individual shareholders and the public interest in different jurisdictions. We wish to scrutinise the foundation of key concepts of corporate governance because each country understands these concepts slightly differently, and if policy-makers wish to amend the law these tenets need to be thoroughly examined. We hope that this might be particularly useful for policy-makers in the transition countries including countries that are applying to join the European Union (EU), but also when each jurisdiction reviews its corporate governance systems.

Our research shows that although the neo-liberal paradigm is extraordinarily powerful, so much so that many scholars expect that all corporate governance systems will be converged eventually, there is divergence particularly in important details. The ongoing Western recession might trigger a revolution of corporate governance,² allowing a stakeholder model to thrive. In the meantime national policy-makers need to see the global picture before drafting laws and corporate governance systems which reflect as much as possible the culture of their country, adapting it to the international 'standards' promoted by global institutions. Chapter 1 considers the history and philosophy of neo-liberalism and the colonisation of the neo-liberal paradigm on corporate governance, particularly the way in which it is promoted in codes, templates and standards. The contractual model of bargains and companies is discussed, showing why a contractual model leads inevitably to inequality. When

² Dignam, A. and M. Galanis, *The Globalization of Corporate Governance* (Ashgate, Farnham 2009): 'the rule of the free-market radicals that started with Margaret Thatcher and Ronald Reagan has ended with a big bang'. If that is so, then the price of that bang will be high, indeed the down payment has already by early 2009 been exorbitant, but perhaps in a more regulated demand-managed world, stability and incremental innovation may come to be valued once more over excess profitability, and in turn the insider corporate governance model may once more have its day in the sun (p. 419).

inequality is predominant, this leads to a democratic deficit because of the imbalance between actors. Democracy is not just a matter of voting; imbalance between powerful interests is crucial. Trying to balance the powerless and the powerful is a fundamental tenet for democracy. A stakeholder model of corporate governance tends to iron out some of the imbalances. There is no doubt that a principal reason for the 2007–2008 financial crash is the imbalance between the financial sector and governments. A bank too big to fail is inevitably a risk because of a conflict of interests between a society and the financial sector. The situation was morally hazardous because the risk of gambling was high. The neo-liberal contractual model followed by the banks allowed them to become powerful because there were not enough checks and balances in the companies. The shareholders wanted the profit, the governments wanted investments in the economy, and other stakeholders were powerless. Eventually this led to bail outs by the taxpayers. We see now the consequences of reckless borrowing which is linked to the bank crisis in the Eurozone. Unfortunately national policy-makers cannot significantly influence the corporate governance of big banks because the corporate governance of banks is regulated internationally; however, a system of scrutinising public companies in each jurisdiction is important to make sure that stakeholders have sufficient information.

Environmental protections by companies have become essential because of the need to live sustainably. The threat of climate change is enormous. Here the tensions are immense because all companies consume resources in their trading and manufacture. The neo-liberal theory is particularly dangerous here because of its rooted dislike of regulation and also the ability to use extraterritoriality especially in switching assets between companies. Chapter 2 discusses the convergence and divergence in corporate governance in each jurisdiction and why public policies matter. We believe it is crucial to reflect the history and political ideology of each society. Differences matter if communities are to be comfortable and find their identity. In Chapter 2 we identify four streams of corporate governance, which of course have many tributaries. Roughly we have identified: (1) legal-based corporate governance scholarship focusing on shareholder rights, agency problems between shareholders and the management on companies and different models of boards;³ (2) an economic analysis of corporate governance trying to assess the efficiency of

³ Andenas, M. and F. Wooldridge, *European Comparative Company Law* (Cambridge University Press, Cambridge 2009); du Plessis, J.J., A. Hargovan and M. Bagaric, *Principles of Contemporary Corporate Governance* (Cambridge University Press, Cambridge 2011).

different models of company structures;⁴ (3) the debate between the shareholder primacy model versus the stakeholder design of company and whether the models are converging;⁵ (4) a soft-law focus which involves wider issues including ethical principles in companies, such as issues of sustainability and corporate social responsibility. This category includes the concession theory of companies.⁶ Chapters 3, 4 and 5 consider these four streams of corporate governance in the context of a detailed knowledge of the structures of companies in the USA, the UK and Germany, demonstrating their diversity. Amending or drafting company law or principles of corporate governance needs detailed consideration of the structure of boards or the rights of stakeholders, while simultaneously considering the cultural identity of each nation.

⁴ Dignam and Galanis (2009).

⁵ Hansmann, H. and R. Kraakman, 'The End of History for Corporate Law' (2000), *Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series*, paper 280.

⁶ For example: Parkinson, J., 'The Socially Responsible Company' in M. Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer, The Hague 1999); Boeger, N., R. Murray and C. Villiers (eds), *Perspectives on Corporate Social Responsibility* (Edward Elgar Publishing, Cheltenham 2008); Keay, A., *The Corporate Objective* (Edward Elgar, Cheltenham 2011).