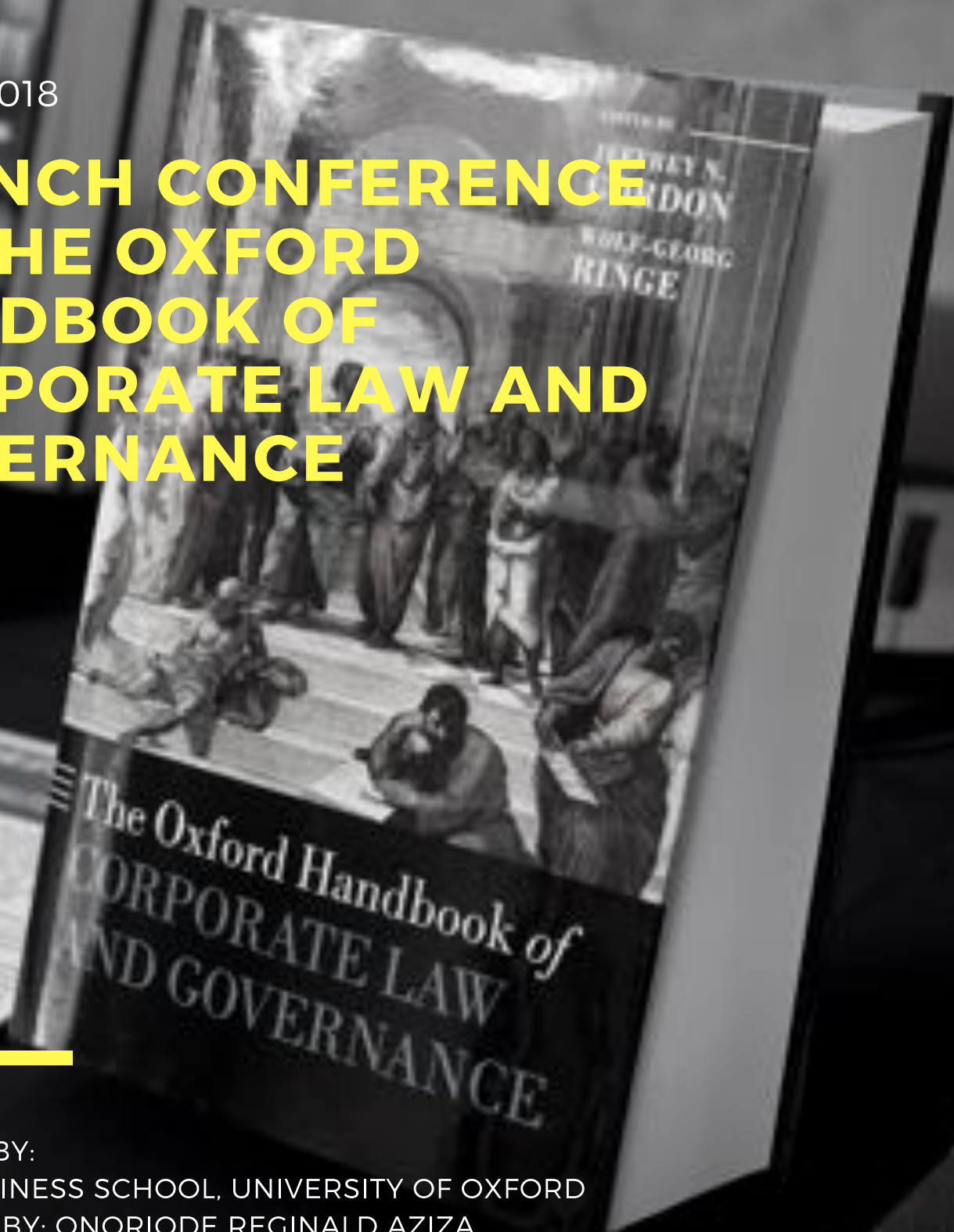


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LAUNCH CONFERENCE OF THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE



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LAUNCH CONFERENCE

OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE

Corporate law scholarship has witnessed transformative growth in modern times, strongly influenced by globalization, a recognition of the importance of governance to corporate performance, and a greater acceptance of the place of corporate law as a component in the mix of institutions supporting well-functioning modern economies. An examination of these factors and other core questions came up for discussion in May 2018 at the book launch conference of the Oxford Handbook of Corporate Law and Governance.

The conference was held at the Saïd Business School and was organised by the book's editors Jeffrey Gordon and Georg Ringe. This report summarises key discussion points at the conference, along three broad themes: the evolution of corporate governance and the future of the corporation; short-termism and stakeholder constituencies in corporate governance; and convergence/persistence in corporate law.



1. CORPORATE GOVERNANCE AND THE FUTURE OF THE CORPORATION

Ronald Gilson's presentation (based on his Handbook chapter) traced the evolution from corporate law to corporate governance through three examples of how scholars and policymakers have complicated the inquiry into corporate behaviour. First, Professor Gilson argued that the easiest way to think of corporate governance is as the firm's operating system: a braided framework of legal and non-legal elements, providing the mechanism within which the internal system of the firm comes together in building relationships of trust. To the extent law has a role to play in this operating system, it is that it provides a structure within which the informal components of the system can operate.

Second, Professor Gilson argued that corporate governance is a path-dependent process that co-evolves with the elements of the broader political/economic system. This shows the importance of placing corporate governance in the context of the polity in which the firm operates. The combination of path dependence and history/politics also shows the complementarity between the rules and the political and economic system, such that, when single parts of the system are reformed, things are likely to get worse before they get better.



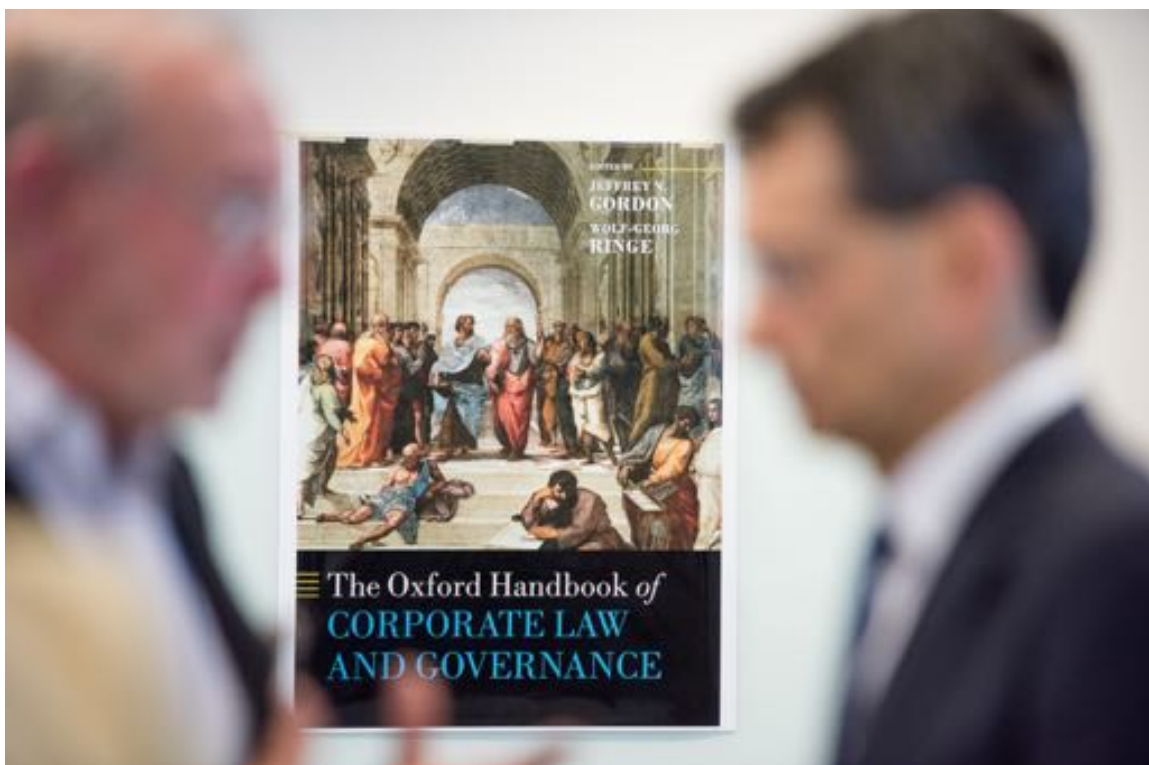
These factors mean that there is no model of corporate governance adequate for all time, in all countries and for all firms. Thirdly, Professor Gilson recounted efforts to simplify the corporate governance analysis using single factor models: the shareholder primacy, director primacy, stakeholder primacy and team production models. The problem with these models, however, is that they are static and do not properly account for the dynamism of the operating system or the context in which it operates. In the end, corporate governance is complicated and contextual today because so are the product and capital markets driving its evolution.

If governance is complicated and contextual today, can it be simplified for tomorrow? This issue was addressed by Colin Mayer. Professor Mayer provided an alternative approach to simplifying corporate governance by arguing for 'purposeful regulation'. In this conception, the law would require corporations to incorporate around their purposes and then require them to pursue those purposes. This purposeful ordering does not necessarily have to be a utopian ideal of firms all pursuing long-term purposes. In this universe, different corporations can have long-term or short-term purposes which would be perfectly legitimate (subject to the law's ability to restrict socially harmful purposes). They will however be evaluated in terms of their success in delivering on those stated purposes. This approach should promote corporate diversity, corporate success, reciprocal obligations, investor engagement and public purpose alignment.



2. SHORT-TERMISM AND THE INTERESTS OF DIFFERENT CORPORATE CONSTITUENCIES

Throughout the US, there is a growing concern over the potentially negative consequences of stock market short-termism. Is there really a short-termism problem in the US, and if there is, is it showing itself in wider economic indicators? This was the focus of Mark Roe's presentation and Handbook chapter. Professor Roe argued that if short-termism is a concern, then, we ought to see evidence of hyper trading activity and increased shareholder activism. These predicates should lead to at least three negative consequences: a reduction in research and development, buybacks and cash stripping leading to reduced funds in corporate coffers, and a decline in capital spending. Professor Roe argued that although the predicates are present, the consequences cannot be seen in economy-wide data. On research and development, economy-wide data shows that investment in research and development in the United States is increasing irrespective of the way it is scaled. Secondly, buybacks are increasing in the United States, but so is the issuance of long-term debt. Therefore, on a net basis, US firms do not have less funds as a result of increased buybacks. Finally, although capital spending is indeed declining in the US, it is also declining in countries that are not as dependent on the stock markets as the US (including Japan, Germany and the OECD countries). Indeed, it is arguable that capacity utilization in the US has not fully recovered from the global financial crisis. The consequence of this is that whilst trading and activism are increasing and holding periods are becoming shorter, every major consequence expected from corporate short-termism either cannot be found in the economy-wide data or is difficult to show as emanating from the stock markets.



Other countries, such as France, have been more deliberate in their attempts to regulate short-termism. Marco Becht's discussion paper examined one such attempt at regulation: the use of loyalty shares, given legislative fiat through the Loi Florange ('The Law to Reconquer the Real Economy'). The loyalty shares provided for under the statute entitle shareholders who have held shares in the corporation for two years to acquire double voting rights. The statute made loyalty shares the default provision of corporate statutes. Corporations, through a supermajority vote of shareholders, may revert to one-share-one-vote (OSOV). Existing listed corporations had two years to opt-out of this provision through amendments to their constitutional documents before existing shareholders doubled their voting rights. IPO companies, in turn, may easily opt out of the loyalty shares default before going public. Professor Becht showed that most OSOV corporations reverted to their pre-reform contract after the passage of the law. The exceptional cases where corporations did not revert were mostly corporations in which the French state held a blocking minority stake. In the case of new IPOs, the change in default rule did have an unexpected impact: the proportion of loyalty share corporate statutes increased after the passage of the law, which is harder to reconcile with the Coase theorem.

The conversation on the actions of the state as a corporate shareholder naturally led to a broader exploration of the competing interests of the different corporate constituencies, and how the law tries to cater for these divergent interests. Simon Deakin explored this issue, looking at the place of capital and labour in corporate governance. Professor Deakin showed that shareholder rights have substantially increased over time, and the rights accorded to shareholders under French civil law jurisdictions have almost caught up with shareholder rights in common law systems. Similarly, creditor rights have increased around the world, but not as much as shareholder rights. On the other hand, labour rights have been at a virtual standstill or declined. Similarly, labour share (i.e. the portion of national income devoted to labour compensation) has been falling from around 1990. This is particularly the case in the US, Korea, Spain and Italy, and, to a lesser degree, in developing countries. The fall in labour share reflects growing inequality but higher productivity in the sense that cheap labour appears to be substituting for capital. In addition, because shareholder rights have improved, the cost of capital has increased and the hurdle rate for investments is now significantly higher than the cost of capital, leading firms to be less interested in investing. The solution for the future appears to be making capital cheaper, but labour more expensive.

3. CONVERGENCE AND PERSISTENCE IN CORPORATE LAW

Are the forces of convergence still pulling in the direction of greater uniformity of corporate law and governance codes or is the growth of nationalism and populism likely to stymie the convergence march? This was the focus of the panel debate at the close of the conference. The panel, chaired by Wolf-Georg Ringe (University of Hamburg), comprised Stephen Haddrill (FRC), Robert Hodgkinson (ICAEW), Christopher Saul (Christopher Saul Associates), Vanessa Knapp (CCBE and Queen Mary University), Luca Enriques (University of Oxford) and Jeffrey Gordon (Columbia Law School).

Stephen Haddrill extolled the virtues of corporate governance codes in delivering convergence. He argued that in the past, codes have led to separation of the Chairman from the CEO and the proliferation of audit committees and independent directors. These have eased the work of the global accounting firms in delivering standardisation and consistency in reporting. Mr Haddrill viewed codes as more flexible than law, and as particularly useful in moving corporate behaviour beyond what is simply required by law. However, we should not expect too much from codes – particularly comply or explain codes, which, in the absence of compliance, are only as good as the quality of explanations provided.

Mr Haddrill's views were echoed by Robert Hodgkinson who also believed convergence is important and in its absence, the accounting profession and securities regulation will be significantly affected. In his view, the world of accounting research has learnt a lot from international accounting standards, which has been one of the key wins of convergence.

Christopher Saul examined convergence by using a unique example: shareholder activism. Whilst activism has been a longstanding feature of US corporations, activism has been historically restrained in the UK. However, this is changing. Activist campaigns in the UK have been increasing in recent years, and are expected to reach record levels in 2018. This uptick in activism can be attributed to at least five reasons: increased funds available to activists, the fall in value of the Sterling, growing accommodation by other institutional investors, lack of clarity of purpose and strategy by some public companies, and provisions of UK law which are accommodating to activist campaigns (e.g. the 5% threshold to call a shareholders' meeting and the annual election of directors). This increase in activism can also be seen in Asia and Continental Europe and provides palpable evidence of global convergence.

Vanessa Knapp argued convergence is driven by governments, businesses and the coming together of people. Governments have become more aware of differences in corporate governance systems, and as they try to attract more investments into their countries, they have become more willing to change local regulation. In addition, globalization is forcing businesses to adopt better governance practices as a way of attracting investment from funds and institutional investors. Practising and academic lawyers rubbing minds in various fora also improve the shared knowledge base and thus bridge gaps between legal systems. In Ms Knapp's view, it is unlikely that Brexit will have an impact on the move towards convergence, as it is unlikely that the UK will silo itself away from the rest of the world.

Luca Enriques provided the alternate view on persistence. Although Hansmann and Kraakman once famously argued for the end of history in corporate law, Professor Enriques argued that current trends suggest the 'restart of history'. This restart, fuelled by left-wing populism, right-wing nationalism, and displacing technology, can be seen in the attack on free-trade based economic globalization and liberal democracy. The reality of the modern economy is that shareholder value is receding, while current political trends can lead to one of two alternate outcomes: a retreat from the convergence on the Washington Consensus with each country moving to its own idiosyncratic form of capitalism or the parallel convergence of most countries to a new, corporatist and statist model.

On his part, Jeffrey Gordon summarized his Handbook chapter on the convergence/persistence question. He argued that although some United States parties have claimed that excessively strict US rules have led to the decline in IPOs there and their increase elsewhere, the overall picture is actually a positive story: the reason IPOs from foreign issuers in the US is down is because standards elsewhere are better. Moreover, the internationalization of disclosure standards, mediated through investment banks and international accounting firms, can overcome local governance shortfalls so as to facilitate IPOs without a US listing. This improvement and convergence in standards in emerging market economies is, however, less a product of a race to the top than a consequence of global governance as championed by the World Bank and the IMF in recent times. The insistence on global standards is not necessarily to reduce the cost of funding but rather, to increase financial stability: if developing countries improve their governance, Western funders can lend to these countries with reduced fears of failure. This, in turn, should improve global financial stability. Professor Gordon also suggested that the recent turn to "stewardship" by large institutional investors reflected their concerns about "stability," which seems threatened by an exclusively efficiency-focused governance model.



About the book

The Oxford Handbook of Corporate Law and Governance

Edited by Jeffrey N. Gordon and Wolf-Georg Ringe

Oxford Handbooks

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Description

Corporate law and corporate governance have been at the forefront of regulatory activities across the world for several decades now, and are subject to increasing public attention following the Global Financial Crisis of 2008. The Oxford Handbook of Corporate Law and Governance provides the global framework necessary to understand the aims and methods of legal research in this field.

Written by leading scholars from around the world, the Handbook contains a rich variety of chapters that provide a comparative and functional overview of corporate governance. It opens with the central theoretical approaches and methodologies in corporate law scholarship in Part I, before examining core substantive topics in corporate law, including shareholder rights, takeovers and restructuring, and minority rights in Part II. Part III focuses on new challenges in the field, including conflicts between Western and Asian corporate governance environments, the rise of foreign ownership, and emerging markets. Enforcement issues are covered in Part IV, and Part V takes a broader approach, examining those areas of law and finance that are interwoven with corporate governance, including insolvency, taxation, and securities law as well as financial regulation.

The Handbook is a comprehensive, interdisciplinary resource placing corporate law and governance in its wider context, and is essential reading for scholars, practitioners, and policymakers in the field.

