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Transnational Migration of Laws and Norms in Corporate Governance

Fiduciary Duties and Corporate Codes

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9.1 INTRODUCTION

Transnational law is a far-from-settled concept.[1] There is uncertainty as to what the term actually means,[2] and how it differs from other concepts,[3] such as national legal ordering or global law.[4] For early theorists in the field, the essence of transnational law was its role in regulating conduct or events that crossed national boundaries.[5] More recent scholarship, however, has focused not on *what* is being regulated,[6] but rather on *how* laws and norms are transmitted between supranational and local

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[1] *See, e.g.*, Ralf Michaels, *State Law as a Transnational Legal Order*, 1 U.C. IRVINE J. INT'L, TRANSNAT'L & COMP. L. 141, 143 (2016) (describing transnational law as "vague" and outlining different possible meanings of transnational law). *See also* Peer Zumbansen, *Can Transnational Law be Critical? Reflections on a Contested Idea, Field and Method*, *in* RESEARCH HANDBOOK ON CRITICAL LEGAL THEORY 473, 478 (Emilios Christodoulidis et al. eds., 2019).

[2] *See* Gregory Shaffer, *Theorizing Transnational Legal Ordering*, 12 ANN. REV. L. & SOC. SCI. 231, 232 (2016) (noting that references to transnational law or legal ordering are often vague, resulting in academic literature becoming "a jungle without a map").

[3] *See generally* Michaels, *supra* note 1; Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, *in* TRANSNATIONAL LEGAL ORDERS 3, 3–4, 11*ff* (Terence C. Halliday & Gregory Shaffer eds., 2015).

[4] *See, e.g.*, Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW. & CONTEMP. PROBS. 15, 15 (2005).

[5] PHILIP C. JESSUP, TRANSNATIONAL LAW 2 (1956).

[6] *See, e.g.*, Shaffer, *supra* note 2, at 232.

levels.[7] Nonetheless, a common theme underpinning most conceptions of transnational law is that it involves social problems and solutions that transcend any individual state,[8] and that, as a result, "[l]aw can no longer be viewed through a purely national lens."[9]

Corporate governance, with its array of public and private actors,[10] fits naturally within the concept of transnational law.[11] Financial markets today are global and interconnected,[12] and transnational law provides a valuable framework for examining a range of contemporary corporate governance issues. Although capital market structures across jurisdictions vary significantly,[13] globalization increases the risk of similar or shared problems, which can be exacerbated via contagion across financial markets.[14] In this environment, the corporation has taken on a greater societal role.[15] Indeed, according to The British Academy's influential *Future of the Corporation* project, the main purpose of business today is "to solve the problems of people and planet profitably."[16]

A spate of corporate law scandals and crises in recent decades has highlighted the transnational nature of contemporary corporate governance. At the beginning of the twenty-first century, scandals, including Enron and WorldCom in the United

[7] *See, e.g.*, Halliday & Shaffer, *supra* note 3, at 3; Shaffer, *supra* note 2, at 237; Michaels, *supra* note 1, at 144–47.

[8] However, according to Halliday and Shaffer, the nation-state remains a central feature of lawmaking, and therefore transnational law and state law are closely connected. *See* Halliday & Shaffer, *supra* note 3, at 13. *See also* Michaels, *supra* note 1, at 147. Major shifts can occur in the political balance between transnational and national legal orders. *See, e.g.*, Zumbansen, *supra* note 1, at 473.

[9] Halliday & Shaffer, *supra* note 3, at 63.

[10] *See generally* Dionysia Katelouzou & Peer Zumbansen, *The New Geographies of Corporate Governance*, 42 U. Pa. J. Int'l L. 51 (2020).

[11] *Id.* at 69–70 (referring to the "distinctly *transnational*, *hybrid* formation processes of corporate governance in globalized financial markets").

[12] *See, e.g.*, World Economic Forum, The Financial Development Report 2009, xi (2010); Int'l Org. Sec. Comm'n (IOSCO), *Remarks by David Wright, Secretary General of IOSCO, The Atlantic Council, Washington, DC*, Dec. 10, 2012, 5, https://www.iosco.org/library/speeches/pdf/20121210-Wright-David.pdf (accessed June 14, 2022).

[13] Capital market structure lies across a spectrum, from concentrated ownership to less concentrated ownership, with differing levels of institutional investment. *See, e.g.*, OECD, OECD Corporate Governance Factbook 2021 24–26 (2021), https://www.oecd.org/corporate/Corporate-Governance-Factbook.pdf (accessed June 14, 2022); Dan W. Puchniak, *The False Hope of Stewardship in the Context of Controlling Shareholders: Making Sense out of the Global Transplant of a Legal Misfit*, Am. J. Comp. L. (forthcoming); OECD, Owners of the World's Listed Companies Annex, Table A.4 (2019), https://www.oecd.org/corporate/ca/Owners-of-the-Worlds-Listed-Companies.pdf (accessed June 14, 2022).

[14] *See, e.g.*, *supra* note 12.

[15] *See, e.g.*, Jennifer G. Hill, *Corporations, Directors' Duties and the Public/Private Divide*, *in* Fiduciary Obligations in Business 285 (Arthur B. Laby & Jacob Hale Russell eds., 2021); Katelouzou & Zumbansen, *supra* note 10.

[16] *See* The British Acad., Policy & Practice for Purposeful Business: The Final Report of the Future of the Corporation Programme, 48 (2021) (UK).

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States,[17] occurred around the world.[18] Although these scandals appeared in multiple jurisdictions, they were arguably isolated events with different origins and motivations.[19] The same cannot be said of the 2007–09 global financial crisis, which exemplified the risk of contagion across interconnected financial markets.[20] This risk is again apparent in the continuing economic fallout from the COVID-19 crisis.[21]

Not only can corporate governance problems transcend national boundaries, so too can their solutions, which often involve regulatory efforts at both a national and transnational level.[22] Discerning the causes of these crises is rarely an easy feat, yet the framing of the underlying problems can be critical to the particular legal solutions adopted.[23]

Corporate governance today is highly fragmented; it has been described as "a braided framework encompassing legal and non-legal elements."[24] These elements operate to "constrain and enable" the behavior of key corporate players, which is an

[17] *See, e.g.*, Jeffrey N. Gordon, *What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections*, 69 U. Chi. L. Rev. 1233 (2002); John C. Coffee, *What Caused Enron?: A Capsule Social and Economic History of the 1990s*, 89 Cornell L. Rev. 269 (2004).

[18] *See generally* Jennifer G. Hill, *Regulatory Responses to Global Corporate Scandals*, 23 Wis. Int'l L.J. 367 (2005).

[19] *See* John C. Coffee, *A Theory of Corporate Scandals: Why the US and Europe Differ*, 21 Ox. Rev. Econ. Pol. 198 (2005).

[20] *See* World Economic Forum, *supra* note 12.

[21] *See, e.g.*, Panel 1, Monash University: *The Differential Health, Economic and Financial Effects of the COVID-19 Crisis*, European Corporate Governance Institute (ECGI) and Global Corporate Governance Colloquia (GCGC), *The COVID-19 Crisis and Its Aftermath: Corporate Governance Implications and Policy Challenges*, 24 Hour Global Webinar (Apr. 16, 2020), https://ecgi.global/content/covid-19-crisis-and-its-aftermath-corporate-governance-implications-and-policy-challenges (accessed June 14, 2022) (comparing and contrasting the impact of the global financial crisis with the likely economic impact of the COVID-19 crisis).

[22] *See* Luca Enriques, *Regulators' Response to the Current Crisis and the Upcoming Reregulation of Financial Markets: One Reluctant Regulator's View*, 30 U. PA. J. Int'l L. 1147 (2009). The quest for financial stability in the wake of the global financial crisis is a classic example of how the legalization of social orders increasingly occurs at a transnational level. Halliday & Shaffer, *supra* note 3, at 3.

[23] *See* Halliday & Shaffer, *supra* note 3, at 7–8. There were multiple possible explanations for the collapse of Enron and the global financial crisis, which resulted in different regulatory responses to these crises. *See generally* Coffee, *supra* note 17; Hill, *supra* note 18; Eilis Ferran et al., The Regulatory Aftermath of the Global Financial Crisis (2012).

[24] Ronald J. Gilson, *From Corporate Law to Corporate Governance*, *in* The Oxford Handbook of Corporate Law and Governance 3, 6 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018). *See also* Mariana Pargendler, *The Rise of International Corporate Law*, 98 Wash. U. L. Rev. 1765, 1818 (2021) (describing international corporate law as "not monolithic, but fragmented, diverse, highly networked, and dynamic"); Tim Bowley & Jennifer G. Hill, *The Global ESG Stewardship Ecosystem* (2022) (unpublished manuscript) (on file with the authors); Elizabeth Pollman, *Corporate Social Responsibility, ESG, and Compliance*, in Cambridge Handbook of Compliance 662 (D. Daniel Sokol &

important aspect of transnational legal orders.[25] This chapter explores, from a transnational perspective, the transmission of laws and norms that constrain directors' conduct and enhance corporate accountability,[26] focusing on two key examples of such accountability mechanisms – fiduciary duties and corporate codes. The chapter begins with a comparative and historical examination of directors' fiduciary duties in the United States, the United Kingdom, and Australia. It analyzes whether the transfer of fiduciary law to these common law jurisdictions has resulted in a unified approach to directors' duties, as is often assumed by studies such as the *law matters* hypothesis.[27] The chapter then moves on to discuss the modern phenomenon of national corporate codes, which originated in the United Kingdom in the early 1990s. The chapter considers the global transmission of these codes and their role as "norm creators." It also assesses the transmission of these laws and norms against the backdrop of convergence and path dependence theories in corporate governance.

9.2 TRANSMISSION OF LAW THROUGH LEGAL TRANSPLANTATION AND IMITATION: UNCOMMON COMMON LAW APPROACHES TO DIRECTORS' FIDUCIARY DUTIES

Fiduciary duties constitute one of the most important legal mechanisms for constraining the conduct of company directors. The law of fiduciary duties was, from a historical perspective, a distinctly national affair.[28] The classification of company directors as "fiduciaries" represented a central pillar of early British law, developing by analogy to trustees and agents,[29] who were considered archetypal fiduciaries.[30] The famous 1742 UK decision, *Charitable Corp v. Sutton* ("Sutton's case"),[31] laid the groundwork for modern directors' duties, with Lord Hardwicke LC stating that

Benjamin van Rooij eds., 2021); Wolf-Georg Ringe, *Investor-Led Sustainability in Corporate Governance* (Working Paper, Nov. 2021).

[25] *See* Halliday & Shaffer, *supra* note 3, 5.

[26] *See* John Armour et al., *Agency Problems and Legal Strategies*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 29 (Kraakman et al. eds., 3d ed. 2017).

[27] *See generally* Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998); Rafael La Porta et al., *Corporate Ownership Around the World*, 54 J. FIN. 471 (1999).

[28] *See generally* Jennifer G. Hill & Matthew Conaglen, *Directors' Duties and Legal Safe Harbours: A Comparative Analysis*, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW 305, 306–07 (D. Gordon Smith & Andrew S. Gold eds., 2018). *See also* Halliday & Shaffer, *supra* note 3, at 3.

[29] *See* Deborah A. DeMott, *Fiduciary Principles in Agency Law*, *in* FIDUCIARY PRINCIPLES IN AGENCY LAW 23, 23–24 (Evan J. Criddle et al. eds., 2018).

[30] *See* Hosp. Prods Ltd v. US Surgical Corp. (1984) 156 CLR 41, 68 (Austl.).

[31] Charitable Corporation v. Sutton (1742) 2 Atk. 400 (UK).

directors were bound to execute their responsibilities with "fidelity and reasonable diligence."[32]

There are strong similarities in the approach to directors' fiduciary duties across common law jurisdictions, such as the United Kingdom, the United States and Australia.[33] This is hardly surprising, given the United Kingdom's colonial past.[34] The similarities are often clear historical examples of legal transplantation[35] of British law to other common law jurisdictions.[36] In Delaware, the most important US state for the purposes of corporate law,[37] directors' duties of loyalty and care today are the direct descendants of Lord Hardwicke's description of eighteenth-century British directors' responsibilities.[38]

Similarities between common law jurisdictions were an important aspect of La Porta et al.'s influential *law matters* hypothesis, promulgated over two decades ago.[39] This hypothesis had significant implications for the "settlement and unsettlement of legal norms"[40] within a transnational legal ordering framework. The hypothesis claimed that investor legal protection is directly linked to a jurisdiction's financial development,[41] and predicted that jurisdictions with superior investor protection would develop deep dispersed capital market structures, such as those in the United States and the United Kingdom.[42] "Legal origins" played a central role in the hypothesis, since the study concluded that common law jurisdictions within the British "legal family"[43] provided stronger investor protection than civil law jurisdictions.[44] One feature of the common law system that the study viewed as

[32] *Id.* at 406. *See also* Joseph W. Bishop Jr., *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078, 1096–97 (1968).

[33] These similarities also extend to a number of common law jurisdictions in Asia, such as Singapore, Hong Kong, Malaysia, and India.

[34] *See, e.g.*, Umakanth Varottil, *The Evolution of Corporate Law in Post-Colonial India: From Transplant to Autochthony*, 31 AM. U. INT'L L. REV. 253, 258 (2016) (noting Indian corporate law's colonial roots).

[35] *See generally* David Cabrelli & Matthias Siems, *Convergence, Legal Origins, and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis*, 63 AM. J. COMP. L. 109 (2015).

[36] *See* Rafael La Porta et al., *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285, 286 (2008) (arguing that, historically, legal traditions were spread around the globe primarily by conquest and colonization).

[37] *See generally* Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 98 VA. L. REV. 935, 939 (2012).

[38] *See generally* Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 U. PA. J. BUS. L. 675, 680–81 (2009). Australia also took its lead from the United Kingdom with regard to corporate law, including directors' duties. *See, e.g.*, Rosemary Teele Langford et al., *The Origins of Company Directors' Statutory Duty of Care*, 37 SYD. L. REV. 489, 507–08 (2015).

[39] *See supra* note 27.

[40] Halliday & Shaffer, *supra* note 3, at 5.

[41] La Porta et al., *supra* note 36.

[42] *See, e.g.*, OECD, OECD CORPORATE GOVERNANCE FACTBOOK, *supra* note 13.

[43] La Porta et al., *supra* note 27, at 1119.

[44] *See* David A. Skeel, Jr., *Corporate Anatomy Lessons*, 113 YALE L.J. 1519, 1544–45 (2004).

particularly advantageous was the central role of independent judges, who rely on legal reasoning to decide cases.[45] Judicial reasoning is a central feature of the development of fiduciary law.

The *law matters* hypothesis contributed to a major debate in comparative corporate governance as to whether corporate law regimes would converge[46] or whether, as path dependence theorists argued, legal differences around the world would persist.[47] The *law matters* hypothesis provided powerful support for convergence theory,[48] since it assumed that jurisdictions with substandard legal rules would follow the siren song of economic efficiency and adopt superior rules by means of voluntary imitation.[49]

The *law matters* hypothesis proved to be extraordinarily influential in defining a set of problems and their solutions.[50] It also had real-world consequences in terms of changes to legal rules and norms. On the premise that good corporate governance can improve national economic performance, major international organizations, such as the Organisation for Economic Co-operation and Development ("OECD"), developed model corporate governance rules for ready international transplantation.[51] The World Bank also adopted the methodology of the *law matters* study, applying it to a number of working papers, including the bank's *Doing Business* reports.[52] These supranational organizations sometimes required corporate governance reforms as a condition of financial assistance.[53]

[45] *See generally* Cabrelli & Siems, *supra* note 35, at 118–20.

[46] *See, e.g.*, Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 Geo. L.J. 439, 468 (2001) (famously stating "[t]he triumph of the shareholder-oriented model of the corporation over its principal competitors is now assured").

[47] *See generally* Convergence and Persistence in Corporate Governance (Jeffrey N. Gordon & Mark J. Roe eds., 2004).

[48] For an overview of convergence theory and the convergence-divergence debate, *see generally id.*; Jeffrey N. Gordon, *Convergence and Persistence in Corporate Law and Governance*, *in* The Oxford Handbook of Corporate Law and Governance 28 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018).

[49] *See* Jennifer G. Hill, *The Persistent Debate About Convergence in Comparative Corporate Governance*, 27 Syd. L. Rev. 743, 744 (2005).

[50] *See* Stijn Claessens & Burcin Yurtoglu, *Corporate Governance and Development – An Update*, 10 Global Corporate Governance Forum Focus 1, 11 (2012); Cally Jordan, *The Conundrum of Corporate Governance*, 30 Brook. J. Int'l L. 983 (2005); Steve Kaplan & Luigi Zingales, *How "Law and Finance" Transformed Scholarship, Debate*, Chi. Booth Rev. (Mar. 5, 2014), https://review.chicagobooth.edu/magazine/spring-2014/how-law-and-finance-transformed-scholarship-debate (accessed June 14, 2022).

[51] *See, e.g.*, Org. for Econ. Co-operation and Dev., G20/OECD Principles of Corporate Governance 3 (2015); Jordan, *supra* note 50, at 986, n. 5. *Cf.* Amir N. Licht, *Legal Plug-Ins: Cultural Distance, Cross-Listing, and Corporate Governance Reform*, 22 Berkeley J. Int'l L. 195, 196 (2004) (arguing that, in the "long and checkered" history of legal transplantation, "direct transplantation efforts were largely futile in generating Western-like economic growth").

[52] *See* Cabrelli & Siems, *supra* note 35, at 120.

[53] *See* Gilson, *supra* note 24, at 5; Timothy Lane et al., *IMF-Supported Programs in Indonesia, Korea, and Thailand*, 178 Int'l Monetary Fund Occasional Paper 1, 72–73 (1999); John

In spite of its influence, the *law matters* hypothesis attracted widespread academic criticism.[54] Much of the censure related to the study's Manichean divide between common law and civil law systems.[55] Another, albeit less prominent, criticism was that the hypothesis overstated the similarities within the common law world.[56]

Although it is often assumed that there is a unified common law approach to fiduciary duties, there are, in fact, significant granular differences at a national level, which, in accordance with transnational legal theory, is also reflected in actual legal practice at the local level. These differences across common law jurisdictions illustrate how supposedly shared laws and norms can diverge in their operation across jurisdictions and over time.[57]

For example, although US corporate law descended from English company law, each legal system had a different organizational starting point.[58] These different starting points radically altered UK and US corporate law trajectories. Modern UK company law derives from the unincorporated joint-stock company, which was a quintessentially private body, with strong contractual elements.[59] US corporate law, on the other hand, developed from a very different type of organization, the British royal chartered corporation, which had strong quasi-public roots and strict mandatory rules limiting directors' actions.[60] The effect of these different organizational

M. Broder, *Asia Pacific Talks Vow Tough Action on Economic Crisis*, N.Y. Times, Nov. 26, 1997, at A1.

[54] *See* Claessens & Yurtoglu, *supra* note 50, at 12. This included criticism of the study's methodology. *See, e.g.*, Holger Spamann, *The "Antidirector Rights Index" Revisited*, 23 Fin. Stud. 467 (2010). La Porta et al. responded to methodological criticism of their original study in several later papers. *See* Cabrelli & Siems, *supra* note 35, at 123.

[55] *See, e.g.*, Skeel, *supra* note 44, at 1546; Katharina Pistor et al., *The Evolution of Corporate Law: A Cross-Country Comparison*, 23 U. Pa. J. Int'l Econ. L. 791, 799 n.27 (2002); Cabrelli & Siems, *supra* note 35, at 117–18; Jordan, *supra* note 50, at 1005, nn. 66–68. *See also* Martin Gelter & Geneviève Helleringer, *Fiduciary Principles in European Civil Law Jurisdictions*, *in* The Oxford Handbook of Fiduciary Law 583 (Evan J. Criddle et al. eds., 2019). In the East Asian civil law context, *see* Zenichi Shishido, *Japanese Corporate Governance: The Hidden Problems of Corporate Law and Their Solutions*, 25 Del. J. Corp. L. 189 (2000).

[56] *See, e.g.*, Ruth V. Aguilera et al., *Corporate Governance and Social Responsibility: A Comparative Analysis of the U.K. and U.S.*, 14 Corp. Governance: An Int'l Rev. 147, 147–48 (2006); Steven Toms & Mike Wright, *Divergence and Convergence within Anglo-American Corporate Governance Systems: Evidence from the US and UK, 1950–2000*, 47 Bus. Hist. 267, 267–68 (2005).

[57] Jennifer G. Hill, *Subverting Shareholder Rights: Lessons from News Corp.'s Migration to Delaware*, 63 Vand. L. Rev. 1, 8–9 (2010).

[58] *See generally* Jennifer G. Hill, *The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat*, U. Ill. L. Rev. 507, 541–47 (2019).

[59] *See id.* at 544–47; John Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 Colum. L. Rev. 2145, 2157–66 (2016).

[60] *See generally* Hill, *supra* note 58, at 541–44; L. C. B. Gower, *Some Contrasts between British and American Corporation Law*, 69 Harv. L. Rev. 1369, 1370–72 (1956). British royal chartered companies reflected the theory that the corporate form was a body, approved by the state to act in "the national interest." *See* C. A. Cooke, Corporation, Trust and Company: An Essay in Legal History 78 (1950).

starting points – and subsequent backlash against those starting points – affected the scope of directors' discretion and the role of fiduciary duties.[61] Whereas, for instance, early American general incorporation law statutes tightly constrained directors' conduct,[62] this changed in the late nineteenth-century era of competition for corporate charters.[63] It was during this period, that Delaware substituted the corporation, rather than the state, as primary "law-maker,"[64] resulting in a new vision of US corporate law as inherently "enabling."[65]

Another difference across common jurisdictions relates to the sources of modern directors' duties. In Delaware, directors' fiduciary duties, true to their historical roots, are purely equitable.[66] There has been a shift, however, under modern UK and Australian law toward statutory directors' duties.[67] UK directors' statutory duties, which were introduced in 2006,[68] eradicate and replace common law and equitable duties,[69] whereas Australia's statutory duties[70] operate in addition to the general law.[71]

The jurisdictions also adopt different approaches as to which directors' duties should, and should not, be classified as "fiduciary." US corporate law tends to regard all directors' duties, including the duty of care, as fiduciary in nature; however, UK and Australian courts only characterize proscriptive duties (or duties requiring "self-denial")[72] as fiduciary.[73] The jurisdictions differ too on the extent to which stakeholder interests are implicated in directors' duties. Whereas Delaware and Australia have traditionally adopted a shareholder-centred approach to directors' duties, the United Kingdom now applies an "enlightened shareholder value"[74] approach to corporate governance, which requires directors to consider the interests of a wide range of stakeholders when making business decisions.[75] India, another common

[61] *See generally* Hill, *supra* note 58, at 541–61.
[62] *See* Morley, *supra* note 59, at 2163.
[63] *See generally* Charles M. Yablon, *The Historical Race – Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880–1910*, 32 J. Corp. L. 323 (2007).
[64] Joel Seligman, *A Brief History of Delaware's General Corporation Law of 1899*, 1 Del. J. Corp. L. 249, 258, 273 (1976).
[65] Hill, *supra* note 58, at 549–53.
[66] *See generally* Holland, *supra* note 38, at 678.
[67] *See generally* Hill & Conaglen, *supra* note 28, at 309–12.
[68] *See* Companies Act, 2006 c. 46, pt. 10 c. 2 (UK).
[69] *See* Companies Act, 2006 c. 46, § 170(4) (UK).
[70] *See* Corporations Act, 2001, §§ 180–84 (Austl.).
[71] *See* G. F. K. Santow, *Codification of Directors' Duties*, 73 Austl. L.J. 336 (1999).
[72] Gelter & Helleringer, *supra* note 55, at 583.
[73] *See generally* Hill & Conaglen, *supra* note 28, at 307–08.
[74] *See* Companies Act, 2006 c. 46, § 172 (UK).
[75] In spite of this apparently "public" focus in § 172(1), the duty remains firmly shareholder-oriented in practice, because the UK statutory directors' duties are owed to the company, and enforceable only by the company, or its shareholders in derivative suit. *See* Companies Act, 2006 c. 46, § 170(1) (UK); Virginia Harper Ho, *Enlightened Shareholder Value: Corporate Governance Beyond the Shareholder–Stakeholder Divide*, 36 J. Corp. L. 59, 79 (2010).

law jurisdiction, goes even further in this regard, adopting a "pluralist approach" that recognizes the interests of both stakeholders and shareholders, "without necessarily indicating a preference to either."[76]

The stringency of fiduciary duties is affected by the scope of certain safe harbors available to directors.[77] A disparity across jurisdictions in this regard is particularly evident in the context of the duty of care.[78] In Delaware, for example, directors receive a high level of protection against monetary liability for breach of the duty of care as a result of the generous US business judgment rule.[79] Even gross negligence will not generally attract liability,[80] given the operation of Del GCL § 102(b)(7), which expressly authorizes the inclusion of exculpation clauses in corporate charters.[81] It also seems that the bedrock of Delaware fiduciary law,[82] the duty of loyalty, can itself now be waived in some circumstances.[83] The same is certainly not true of the UK and Australian legal regimes, which offer far less protection to directors for breach of their duties.[84]

Enforcement of directors' duties is another important way in which these jurisdictions differ from one another. Although private enforcement is the norm in the United States and the United Kingdom,[85] Australian corporate law relies predominantly on a public enforcement regime, whereby the business regulator, the Australian Securities and Investments Commission ("ASIC"), is responsible for enforcing statutory directors' duties. It appears that this mode of enforcement has also affected the substance of directors' duties in Australia, shifting them from the realm of private duties to public duties.[86]

[76] *See* Companies Act, 2013, § 166(2) (India); Varottil, *supra* note 34, at 315.
[77] *See generally* Hill & Conaglen, *supra* note 28.
[78] *See, e.g.*, Julian Velasco, *The Role of Aspiration in Corporate Fiduciary Duties*, 54 Wm. & Mary L. Rev. 519 (2012).
[79] *See, e.g.*, Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984); Gagliardi v. Trifoods International, Inc., 683 A.2d 1049, 1052–53 (Del. Ch. 1996).
[80] *See, e.g.*, Malpiede v. Townson, 780 A.2d 1075 (Del. 2001).
[81] The breadth of protection for breach of the duty of care has attracted criticism in recent times. *See, e.g.*, John Armour & Jeffrey N. Gordon, *Systemic Harms and Shareholder Value*, 6 J. Legal Analysis 35 (2014); Holger Spamann, *Monetary Liability for Breach of the Duty of Care?*, 8 J. Legal Analysis 337, 339 (2016).
[82] *See* Holland, *supra* note 38, at 687.
[83] *See* Del. Code tit. 8, § 122(17); Gabriel Rauterberg & Eric Talley, *Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*, 117 Colum. L. Rev. 1075 (2017).
[84] *See* Hill & Conaglen, *supra* note 28, at 326–29.
[85] The United Kingdom does, however, include some aspects of public enforcement. *See* John Armour et al., *Private Enforcement of Corporate Law: An Empirical Comparison of the United Kingdom and the United States*, 6 J. Empirical Legal Stud. 687, 716–17 (2009). The United Kingdom is a considerably less hospitable jurisdiction for private corporate litigation than Delaware as a result of a number of key procedural differences between the two jurisdictions. *See id.* at 692–96.
[86] *See* ASIC v. Cassimatis [No 8] [2016] FCA 1023, [455], [461], [503] (Austl.); Cassimatis v. ASIC [2020] FCAFC 52, [27], [240] (Austl.). *See generally* Hill, *supra* note 15, at 297;

These differences relating to fiduciary duties in jurisdictions that share a common law heritage sit uneasily with the *law matters* hypothesis. Furthermore, the kind of global convergence in corporate law rules, and the accompanying shift in capital market structure, which was predicted by the *law matters* hypothesis, has not eventuated. Concentrated share ownership has, in fact, increased and continues to be a far more common capital market structure around the world than dispersed ownership.[87]

These fiduciary duty differences are more consistent with a path dependence theory of legal development.[88] Path dependence stresses the importance of historical, political, and social factors in the settling of laws and norms.[89] Each of these factors is important in explaining fiduciary duty differences across common law jurisdictions. Legal change in this area has also often occurred as a result of commercial backlash and strategic responses of regulated parties themselves.[90]

Finally, corporate scandals and crises are prime drivers of legal change. They often result in jurisdictionally tailored regulatory responses,[91] which can differ depending upon the framing of the underlying problem that needs to be addressed.[92] Transmission of law by means of transplantation or voluntary imitation is, therefore, by no means the end of the story. The transmitted law will remain dynamic and continually evolving in local context. This is inevitable, given the possibility of different interpretations of the law at a local level, different priorities concerning policy and enforcement, and the way in which commercial pushback can actually alter the contours of the law.

9.3 THE TRANSNATIONAL IMPACT OF CORPORATE CODES AS NORM CREATORS

The behavior of corporate actors is not only shaped by enforceable national laws. It is also shaped by social norms[93] and governance practices, which may indeed be

Michelle Welsh, *Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia*, 42 Fed. L. Rev. 217, 223–28 (2014).

[87] *See* OECD, OECD Corporate Governance Factbook, *supra* note 13 (classifying only six countries – namely, the United States, the United Kingdom, Australia, Canada, Finland, and Iceland – as having a "least concentrated" ownership structure for listed companies). *See also* Puchniak, *supra* note 13.

[88] *See generally* Gordon & Roe, *supra* note 47; Gordon, *supra* note 48.

[89] *Id.*

[90] *See, e.g.*, David A. Skeel, Jr., *Governance in the Ruins*, 122 Harv. L. Rev. 696, 697 (2008); Curtis J. Milhaupt & Katharina Pistor, Law and Capitalism: What Corporate Crises Reveal about Legal Systems and Economic Development Around the World (2008). For instance, statutory authorization of exculpation clauses in Delaware introduced in response to business community backlash and political pressure, following the decision in Smith v. Van Gorkom, Del.Supr., 488 A.2d. 858 (1985) (US).

[91] *See generally* Hill, *supra* note 18; Ferran et al., *supra* note 23.

[92] *See* Halliday & Shaffer, *supra* note 3, at 7–8.

[93] *See* Matthew Harding, *Fiduciary Law and Social Norms*, *in* Fiduciary Principles in Agency Law, 797, 797 (Evan J. Criddle et al. eds., 2018) (describing social norms as "norms that guide conduct with reference to social expectations").

more important than formal legal rules in affecting the behavior of certain corporate actors, including directors.[94]

Corporate codes can be influential sources of norms that affect directors' behavior.[95] These codes, which provide a sharp contrast with state-made law,[96] have become an important feature of modern corporate governance, and the norms they create are in a state of continuous development.[97] Two types of code are particularly significant in this respect – corporate governance codes ("governance codes") and shareholder stewardship codes ("stewardship codes").

In establishing norms associated with governance procedures and practices, these codes operate in a parallel universe to corporate law. However, they can also interact in complex ways with mandatory corporate law rules, such as fiduciary duties,[98] to drive greater international convergence or divergence. Whereas fiduciary law constitutes an ex post species of regulation, governance codes operate as a form of ex ante self-regulation, which can determine and transmit societal expectations of corporate actors.[99] Such codes can affect the scope of directors' discretion; the balance of power within the corporation; the nature of the directors' obligations; and enforcement mechanisms.

Corporate codes epitomize the movement away from "legal rules standing alone to legal rules interacting with non-legal corporate processes and institutions,"[100] which characterizes modern corporate governance. Furthermore, the lines between formal legal rules and norms can sometimes be blurred and hard to define,[101] and there can be movement in either direction between hard law, comprising enforceable legal rules, and soft law, encompassing norms. For example, the appointment of independent directors on US listed public company boards was a prevalent business norm well before it became mandated under the 2002 reforms following Enron's collapse.[102]

[94] *See generally* John C. Coffee Jr., *Do Norms Matter? A Cross-Country Evaluation*, 149 U. Pa. L. Rev. 2151, 2154*ff* (2001).

[95] *See, e.g.*, Dionysia Katelouzou & Alice Klettner, *Sustainable Finance and Stewardship: Unlocking Stewardship's Sustainability Potential*, *in* Global Shareholder Stewardship 549 (Dionysia Katelouzou & Dan W. Puchniak eds., 2022). Yet, in some respects it seems that stewardship codes may, in fact, be playing catch up with "on the ground" developments in shareholder activism. *See* Tim Bowley & Jennifer G. Hill, *Stewardship Codes, ESG Activism and Transnational Ordering*, *in* Research Handbook on Environmental, Social, and Corporate Governance (Thilo Kuntz ed., 2023).

[96] Katelouzou & Zumbansen, *supra* note 10.

[97] *Id.*

[98] *See* Harding, *supra* note 93, at 797; Katelouzou & Zumbansen, *supra* note 10, at 73–74 (noting that "[a]s codes formulate new modes of accountability, transparency and compliance, doctrinal assessments of corporate and directors' liability . . . change").

[99] *See* Iain MacNeil & Irene-Marie Esser, *The Emergence of "Comply or Explain" as a Global Model for Corporate Governance Codes*, 33 Eur. Bus. L. Rev. 1 (2022).

[100] Gilson, *supra* note 24, at 5.

[101] *See* Coffee, *supra* note 94.

[102] *See* § 301 (3A) Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745 (2002); N.Y. Stock Exchange, Listed Company Manual, § 303A (2003).

Interesting tensions between hard law and soft law are also apparent at an international level. Many common law jurisdictions – though not the United States – protect certain fundamental shareholder rights by mandatory rules in their corporations legislation.[103] The vision of Delaware corporations law as inherently "enabling"[104] has restricted the level of mandatory rules under US state corporations law.[105] As a result, much of US corporate law is made, not by the state but rather by private ordering by corporate actors.[106] In recent times, institutional investors have sought to use private ordering to transplant numerous mandatory shareholder protection rules, embedded by statute in other common law jurisdictions, into the United States on a company-by-company basis.[107] This US trend demonstrates the use of private ordering by shareholders as a self-help mechanism. It suggests that, in an era of globalized investment, institutional investors have become increasingly aware of comparative legal rights across jurisdictions,[108] and it has effectively rendered the United States an importer, rather than exporter, of corporate law.[109] The trend also represents a challenge to transnational law assumptions about the meaning of "globalized business interests,"[110] since it highlights the fact that there is a power struggle in this regard between formidable global institutional investors and US boards of directors.[111]

Corporate codes have been responsible for the global transplantation of norms over the last few decades. Governance codes can be traced back to the influential 1992 UK Cadbury Committee Report.[112] Although the concept of "corporate

[103] *See, e.g.*, Hill, *supra* note 57 (discussing how News Corporation's move from Australia to Delaware in 2004 resulted in reduced governance rights for shareholders).

[104] The idea that US corporate law (specifically Delaware law) is "enabling" became an important feature of the nexus of contracts theory of the corporation. *See generally* Lucian Arye Bebchuk, *Foreword: The Debate on Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395 (1989). *See also* Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639, 651 (2016).

[105] *Cf.* Robert B. Thompson, *Why New Corporate Law Arises: Implications for the 21st Century*, *in* THE CORPORATE CONTRACT IN CHANGING TIMES: IS LAW KEEPING UP? 3, 9–11 (Steven Davidoff Solomon & Randall Stuart Thomas eds., 2019) (noting that, after the shift to permissive state laws, US federal law assumed the "mantle of regulation").

[106] *See* Michal Barzuza, *Inefficient Tailoring: The Private Ordering Paradox in Corporate Law*, 8 HARV. BUS. L. REV. 131 (2018) (critiquing the widely held view that private ordering necessarily promotes efficiency).

[107] This private ordering is typically effected by shareholder proposals and bylaw amendment. *See generally* Hill, *supra* note 58, at 524–29 (2019).

[108] *Id.* at 523–24.

[109] *Id.* at 541.

[110] *See* Zumbansen, *supra* note 1, at 473.

[111] This power struggle has resulted in each group seeking to control the content of corporate law rules via "private ordering combat." *See* Hill, *supra* note 58, at 524–36.

[112] *See* SIR ADRIAN CADBURY, REPORT OF THE COMMITTEE ON THE FINANCIAL ASPECTS OF CORPORATE GOVERNANCE (Dec. 1992). For background to the establishment of the Cadbury Committee, *see generally* Brian R. Cheffins, *The Rise of Corporate Governance in the UK: When and Why*, 68 CURRENT LEGAL PROBS. 387, 406–08 (2015). *See*, however,

governance" had entered the US lexicon during the 1970s,[113] it was not embraced in other common law jurisdictions, such as the United Kingdom and Australia, until the beginning of the 1990s.[114] The Cadbury Committee Report was a major catalyst in its uptake.[115]

The Cadbury Committee's Final Report was accompanied by a *Code of Best Practice*.[116] The famous "comply or explain"[117] aspect of many governance codes was bolstered shortly afterward by an amendment to the London Stock Exchange Listing Rules, requiring all listed companies to include a statement in their annual reports as to whether they fully adhered to the *Code of Best Practice*.[118] Although adherence to the code was not mandatory, any divergence required an explanation. The current version of this code is the 2018 UK Corporate Governance Code.[119]

Since the Cadbury Committee laid down the blueprint for governance codes, their transmission around the world has been remarkable. In 1999, only twenty-four countries were reported to have a national governance code.[120] This number rose to sixty-four by 2008 and to ninety-three by 2015.[121] Almost all of the forty-nine jurisdictions evaluated in a 2019 OECD survey[122] had a national governance code or principles,[123] with 83 percent of those operating on a "comply or explain"

MacNeil & Esser, *supra* note 99 (noting that the "comply or explain" principle from the Cadbury Code is predated by a longer tradition of self-regulation in UK corporate governance).

[113] Cheffins, *supra* note 112, at 389–91.

[114] *See* Brian R. Cheffins, *The History of Corporate Governance*, *in* The Oxford Handbook of Corporate Governance 46, 57 (Douglas Michael Wright et al. eds., 2013); Henry Bosch, *The Changing Face of Corporate Governance*, 25 U.N.S.W. L.J. 270 (2002).

[115] *See* Cheffins, *supra* note 112, at 388. In the Australian context, *see* Bosch, *supra* note 114, at 274; Working Group of the Australian Institute of Company Directors, Corporate Practices and Conduct (1991).

[116] Sir Adrian Cadbury, *supra* note 112.

[117] Interestingly, the Cadbury Committee did not actually use the now-familiar term "comply or explain." *See* Donald Norberg and Terry McNulty, *Creating Better Boards Through Codification: Possibilities and Limitations in UK Corporate Governance, 1992–2010*, 55 Bus. Hist. 348, 362 (2013). For discussion of the concept of "comply or explain" regulation and what is expected in terms of an explanation for divergence from the Principles in the governance code, *see* Fin. Reporting Council, The U.K. Corporate Governance Code 2 (July 2018).

[118] *See* Cheffins, *supra* note 112, at 407; Bosch, *supra* note 114, at 274.

[119] *See* Fin. Reporting Council, *supra* note 117. *See also* Brian R. Cheffins & Bobby V. Reddy, *Thirty Years and Done – Time to Abolish the UK Corporate Governance Code* (Working Paper, June 2022) (arguing that the UK Corporate Governance Code has now outlived its usefulness).

[120] *See* Alice Klettner, *Corporate Governance Codes and Gender Diversity: Management-Based Regulation in Action*, 39 U.N.S.W. L.J. 715, 715 (2016).

[121] *Id.*

[122] *See* Org. for Econ. Co-operation and Dev. (OECD), Corporate Governance Factbook 9, 41*ff* (2019).

[123] *Id.* at 29. A list of current international codes is available on the European Corporate Governance Institute (ECGI) website at https://ecgi.global/content/codes (accessed June 14, 2022).

basis.[124] Yet, the exceptions in the OECD survey were notable. Neither the United States nor India had adopted a national governance code.[125] China was also an outlier,[126] though for different reasons. China has a national governance code in place, but, unlike most other countries' codes, which operate on a voluntary, "comply or explain" basis, the Chinese provisions are mandatory.[127]

What accounts for the success of governance codes as a regulatory technique and their rapid transmission? One important factor was timing. The 1990s, which have been described as "the decade of corporate governance,"[128] witnessed a decline in capital market segmentation, accompanied by the rise of globalized capital markets and investment strategies.[129] This proved to be a ripe environment for reception of norms relating to improved governance practices and procedures.

The spread of governance codes was also aided by a development involving the vertical transmission of norms. In 1999, when only twenty-four countries had adopted a UK-style governance code,[130] the OECD released the first version of its supranational *Principles of Corporate Governance*.[131] As one scholar has noted, the OECD principles were not plucked "from thin air."[132] Rather, they relied on national governance codes, predominantly from common law jurisdictions like the United Kingdom.[133] As the OECD principles received increased attention at the supranational level, the rate of horizontal transmission of governance codes accelerated. This two-directional dynamic effectively transformed the Cadbury Committee's original governance code into an international standard.[134] Top-down vertical transmission of norms by transnational networks, such as the OECD,[135]

[124] Org. for Econ. Co-operation and Dev. (OECD), *supra* note 122, at 29. *See also id.* at 30.

[125] According to the OECD, the United States and India rely instead on "laws, regulations and listing rules as their legal corporate governance framework." *Id.* at 29.

[126] *Id.*

[127] China Securities Regulatory Commission (CSRC), Code of Corporate Governance for Listed Companies (2018) (China).

[128] Moira Conoley, *Moves to Halt Another Decade of Excess*, Fin. Times, Aug. 5, 1999, 10 (cited in Cheffins, *supra* note 114).

[129] MacNeil & Esser, *supra* note 99.

[130] Klettner, *supra* note 120, at 715.

[131] Org. for Econ. Co-operation and Dev. (OECD), Principles of Corporate Governance (1999). The current version of these Principles is Org. for Econ. Co-operation and Dev., *supra* note 51 (though note that, in June 2023, revised Principles were adopted by OECD Ministers for possible approval).

[132] Jordan, *supra* note 50, at 990.

[133] *Id.* at 990–91.

[134] MacNeil & Esser, *supra* note 99.

[135] Other prominent networks of financial regulators during the global financial crisis included the Financial Stability Board (FSB), the Basel Committee on Banking Supervision, and IOSCO. These networks operated vertically during the crisis, by promulgating informal, nonbinding soft law standards, which were subsequently transformed into hard law at a national level. *See, e.g.*, Eric Helleiner, *Regulating the Regulators: The Emergence and Limits of the Transnational Financial Legal Order*, *in* Halliday & Shaffer, at 244–49; Jennifer G. Hill, *Regulatory*

became increasingly visible during the 2007–09 global financial crisis.[136] These developments in contemporary corporate regulation epitomize the fact that transnational legal ordering occurs "multi-directionally and recursively up from and down to the national and local levels."[137]

Corporate scandals and crises have had a central role in the development of corporate codes. In the case of governance codes, for example, the Cadbury Committee's relevance was heightened by a wave of British business scandals that occurred during the committee's deliberations.[138] The United Kingdom also became the first jurisdiction to adopt a national stewardship code,[139] which was a direct response to the global financial crisis.[140] The original UK Stewardship Code was adopted in 2010,[141] with revised versions issued in 2012[142] and 2020.[143]

Stewardship codes highlight the important link between problem framing and regulatory outcomes.[144] For example, a common view in the United States in the aftermath of the global financial crisis was that shareholders contributed to the crisis, by exerting pressure on corporate managers to engage in excessive risk-taking to increase profitability.[145] Yet, a very different interpretation of the crisis existed in the United Kingdom. The prevalent UK view was that the real problem had been the failure by institutional investors to participate actively in corporate governance and to provide an effective counterweight to excessive managerial

Cooperation in Securities Market Regulation: The Australian Experience, 17 Eur. Co. Fin. L. Rev. 11, 13–17 (2020).

[136] *See generally* Helleiner, *supra* note 135; Hill, *supra* note 135.

[137] Halliday & Shaffer, *supra* note 3, at 5.

[138] *See generally* Cheffins, *supra* note 112, at 409–11. *See also* Stephen Bates, *How Polly Peck Went from Hero to Villain in the City*, The Guardian, Aug. 27, 2010; Roger Cohen, *Maxwell's Empire: How It Grew, How It Fell – A Special Report; Charming the Big Bankers out of Billions*, N.Y. Times, Dec. 20, 1991, at A1.

[139] *See* Fin. Reporting Council, The UK Stewardship Code (July 2010).

[140] *See* Walker Review, A Review of Corporate Governance in U.K. Banks and Other Financial Industry Entities: Final Recommendations, Nov. 26, 2009, Recommendations 16–18. The 2010 UK Stewardship Code was based on an earlier Statement of Principles on the Responsibilities of Institutional Investors, which was prepared by the UK Institutional Shareholders' Committee (ISC) in June 2007 and subsequently transformed into a code in November 2009. *See* Walker Review, *supra* note 140, at ¶ 5.13, Annex 8.

[141] *See* Fin. Reporting Council, *supra* note 139.

[142] Fin. Reporting Council, The UK Stewardship Code (Sept. 2012).

[143] Fin. Reporting Council, The UK Stewardship Code (2020).

[144] *See generally* Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 Seattle U. L. Rev. 497 (2018); Tim Bowley & Jennifer G. Hill, *Stewardship and Collective Action: The Australian Experience*, *in* Global Shareholder Stewardship 417 (Dionysia Katelouzou & Dan W. Puchniak eds., 2022).

[145] *See, e.g.*, John C. Coffee, Jr., *Systemic Risk after Dodd-Frank: Contingent Capital and the Need for Regulatory Strategies beyond Oversight*, 111 Colum. L. Rev. 795, 799 (2011).

risk-taking.[146] The 2010 UK Stewardship Code was designed to address this problem.[147]

The horizontal transmission of stewardship codes has, like governance codes, been rapid and widespread. Since 2010, more than twenty countries have followed the United Kingdom's lead in adopting stewardship codes, and that number is growing.[148] Like the original UK Code, most stewardship codes around the world operate on a "comply or explain" basis, and signing up to such codes is also usually voluntary.[149]

Asian jurisdictions, in particular, have been eager to embrace stewardship codes.[150] This is in spite of the fact that the structure of Asian capital markets is fundamentally different from the UK capital market structure. Unlike UK listed companies, where the vast majority of shares are held by institutional investors,[151] Asian listed companies typically have concentrated ownership structures, with family members or the state as controlling blockholders.[152] This underlying difference can skew the operation of these codes, so that any similarity to the original UK

[146] *See, e.g.*, John Plender, *Shut Out*, Fin. Times, Oct. 18, 2008 (asking "where were the shareholders?"); Walker Review, *supra* note 140, at ¶ 5.11 (stating that "[w]ith hindsight it seems clear that the board and director shortcomings ... would have been tackled more effectively had there been more vigorous scrutiny and engagement by major investors acting as owners"); Andrew G. Haldane, Chief Economist, Bank of England, *Who Owns A Company?*, speech given at University of Edinburgh Corporate Finance Conference, 8, 11 (May 22, 2015), https://www.bis.org/review/r150811a.pdf (accessed June 14, 2022) (stating that "companies tend to have higher valuations when institutional investors are a large share of cashflow, perhaps reflecting their stewardship role in protecting the firm from excessive risk-taking").

[147] A later version of the code made large claims, stating that "[e]ffective stewardship benefits companies, investors and the economy as a whole." *See* Fin. Reporting Council, *supra* note 142, at 1.

[148] For a list of jurisdictions that have to date adopted stewardship code or analogous initiatives, *see* Alice Klettner, *Stewardship Codes and Shareholder Participation in Governance*, 70 Governance Directions 227, 228–29, Table 1 (2018). *See also* Dionysia Katelouzou and Mathias Siems, *The Global Diffusion of Stewardship Codes*, *in* Global Shareholder Stewardship 631 (Dionysia Katelouzou & Dan W. Puchniak eds., 2022).

[149] Katelouzou & Klettner, *supra* note 95.

[150] Jurisdictions in Asia that have adopted a form of stewardship code to date include Japan, Malaysia, Hong Kong, Taiwan, Singapore, South Korea, and Thailand. *Id.*

[151] *See, e.g.*, Paul Davies, *Shareholders in the United Kingdom*, *in* Research Handbook on Shareholder Power 355, 356 (Jennifer G. Hill & Randall S. Thomas eds., 2015); House of Commons Business, Energy and Industrial Strategy Committee, *Corporate Governance: Fourth Report of Session 2016–17*, Mar. 30 2017 at §§ 13–16.

[152] *See* Puchniak, *supra* note 13; OECD, Owners of the World's Listed Companies, *supra* note 13 (Average ownership by category of investor, end-2017). In a controlling blockholder context, increasing shareholder rights or responsibilities may be irrelevant, or indeed counterproductive, as an accountability device. *See* Luh Luh Lan & Umakanth Varottil, *Shareholder Empowerment in Controlled Companies: The Case of Singapore*, *in* Hill & Thomas, *supra* note 151, at 572; Kon Sik Kim, *Dynamics of Shareholder Power in Korea in* Hill & Thomas, *supra* note 151, at 535.

model is superficial only.[153] For example, it has been argued that Singapore's "near carbon-copy" of the UK Stewardship Code in fact upends the UK model's goal of enhancing institutional investor participation.[154] Instead, Singapore's version can operate to bolster the existing power of majority shareholders in state-controlled and family-controlled companies, thereby potentially reducing the incentives of institutional investors to participate in corporate governance.[155]

Although the United Kingdom has been the progenitor of governance codes and stewardship codes around the world, the adopted codes are by no means uniform. There is considerable divergence in the substance of these codes,[156] which is attributable to a range of factors, including the issue of "who writes the rules."[157] Divergence is particularly noticeable in terms of the emphasis given to environmental, social and governance (ESG) in modern codes.[158]

A range of different organizations have responsibility for the authorship of corporate codes. They include government agencies, stock exchanges, and business organizations.[159] These diverse origins can result in major differences concerning the stringency and enforceability of codes.[160] They can also affect the content of the codes, including whether the codes emphasize shareholder or stakeholder interests.[161] For example, the United States does not have a national governance code. However, in 2017, the Investor Stewardship Group ("ISG")[162] issued the US Corporate Governance Principles,[163] which are a set of purely voluntary, self-regulatory norms concerning governance. ISG is a collective of some of the largest US-based and international asset owners and managers,[164] including several activist

[153] *See* Puchniak, *supra* note 13; Gen Goto et al., *Diversity of Shareholder Stewardship in Asia: Faux Convergence*, 53 Vand. J. Transnat'l L. 829 (2020).

[154] Dan W. Puchniak & Samantha S. Tang, *Singapore's Puzzling Embrace of Shareholder Stewardship: A Successful Secret*, 53 Vand. J. Transnat'l L. 989 (2020).

[155] *Id.*; Ernest Lim, Sustainability and Corporate Mechanisms in Asia 188–96 (2020).

[156] *See generally* MacNeil & Esser, *supra* note 99.

[157] For discussion of the significance of authorship of rules in the M&A context, *see* John Armour & David A. Skeel, Jr., *Who Writes the Rules for Hostile Takeovers and Why? The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 Geo. L.J. 1727 (2007). *See generally* Hill, *supra* note 144, at 507–13.

[158] *See* Katelouzou & Klettner, *supra* note 95; Bowley & Hill, *supra* note 95.

[159] *See generally* Klaus J. Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation*, 59 Am. J. Comp. L. 1, 8 (2011).

[160] *Id.* at 8–10.

[161] *See* MacNeil & Esser, *supra* note 99.

[162] *See* ISG, *About the Investor Stewardship Group and the Framework for US Stewardship and Corporate Governance*, https://isgframework.org/ (accessed June 14, 2022).

[163] ISG, *Corporate Governance Principles for U.S. Listed Companies* (Jan. 2017), https://www.isgframework.org/corporate-governance-principles/ (accessed June 14, 2022).

[164] Signatories to the principles include, for example, BlackRock, Vanguard, and State Street Global Advisers. For the full list of signatories to the ISG Corporate Governance Principles and Stewardship Principles, *see* https://isgframework.org/signatories-and-endorsers/ (accessed June 14, 2022).

hedge funds.[165] Given the identity of the actors behind the US governance principles, it is hardly surprising that the norms they contain reflect a strongly private, shareholder-focused conception of corporate governance and directors' duties.[166]

These US norms provide a striking contrast with the trajectory of contemporary UK and Australian governance codes. The UK governance code is administered by an independent government-backed regulator, the Financial Reporting Council ("FRC"),[167] and the Australian version is overseen by a governance committee of the Australian Securities Exchange ("ASX").[168] Recent amendments to the UK and Australian governance codes represent a far more public conception of the corporation and of directors' responsibilities than the US Corporate Governance Principles.[169] The 2018 UK Corporate Governance Code notes, for example, that the role of a successful company is not only to create value for shareholders but also to contribute to "wider society."[170] Both the UK and the Australian governance codes also pay heightened attention to the interests of stakeholders, particularly employees.[171] They exemplify how, in contrast to traditional corporate law, governance norms today cover a pluralistic range of concerns, which are promoted by state and private actors alike.[172]

The issue of "who writes the rules" is also highly relevant to stewardship codes. In some jurisdictions, such as the United Kingdom and Japan, stewardship codes are issued by government regulators or quasi-regulators.[173] In others, such as South Korea and South Africa, they are promulgated by industry players.[174] Finally, in some countries, including Australia, Canada, and the United States, stewardship codes have been initiated by investors themselves.[175] This divergence concerning

[165] Activist hedge fund signatories include Value Act Capital and Trian Partners. *Id.*

[166] *See, e.g.*, ISG, *supra* note 163, Principles 1, 2 and 3.

[167] *See* Fin. Reporting Council, *About the FRC*, https://www.frc.org.uk/about-the-frc, https://www.isgframework.org/corporate-governance-principles/ (accessed June 14, 2022).

[168] ASX Corp. Governance Council, Australian Securities Exchange (ASX) Corporate Governance Council, Corporate Governance Principles and Recommendations, 4th ed. (Feb. 2019), https://www.asx.com.au/documents/regulation/cgc-principles-and-recommendations-fourth-edn.pdf (accessed June 14, 2022). The ASX Corporate Governance Council comprises a group of industry stakeholders. *See About the Council*, *id.* at 1.

[169] *See generally* Hill, *supra* note 15, at 289 (discussing the ongoing tension between public and private conceptions of the corporation).

[170] Fin. Reporting Council, *supra* note 117, at 4, Principle A.

[171] *See generally* Jennifer G. Hill, *Shifting Contours of Directors' Fiduciary Duties and Norms in Comparative Corporate Governance*, 5 U.C. Irvine J. Int'l Transnat'l & Comp. L. 163, 178–80 (2020). *See also* Cheffins & Reddy, *supra* note 119 (arguing that a "comply or explain" approach is ill-suited to the increased focus on stakeholder interests in the most recent iteration of the UK governance code).

[172] *See, e.g.*, Katelouzou & Zumbansen, *supra* note 10; Bowley & Hill, *supra* note 24; Ringe, *supra* note 24; Pollman, *supra* note 24, at 668–70.

[173] *See generally* Hill, *supra* note 144, at 507–08.

[174] *Id.* at 508–09.

[175] *Id.* at 509–13.

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"who writes the rules" can influence the content and effectiveness of particular stewardship codes, and can also affect the extent to which shareholder activism, including collective activism, is tolerated and encouraged.[176]

The regulatory goals underpinning the introduction of stewardship codes also vary across jurisdictions. The aim of the original UK Stewardship Code was to provide a check on excessive risk-taking in the aftermath of the global financial crisis. Yet, in Japan, one of the earliest jurisdictions to transplant a UK-style stewardship code, the policy rationale was quite different. Japan's code was designed to reverse declining profitability and increase investor returns, by creating a "warmer climate" for foreign investors and shareholder activists.[177] Japan's adoption of a stewardship code also demonstrates how localized political friction can affect the content of such codes. Japan's stewardship code adopted a relatively gentle approach concerning shareholder activism[178] compared to the UK prototype.[179] It seems that this was a compromise to appease Japanese critics, who resisted the shift effected by the code from a stakeholder-oriented approach to a stronger shareholder-oriented focus.[180] It has been argued that other Asian jurisdictions, such as Singapore, Hong Kong, and Malaysia, have adopted stewardship codes in order to signal their commitment to good corporate governance, thereby attracting foreign investment in global capital markets.[181]

Another factor undermining international convergence of corporate codes is that the underlying UK model has itself undergone fundamental changes over time, creating further disjunction across jurisdictions. For example, in 2018, a British regulatory review[182] branded the much-vaunted and imitated UK Stewardship Code a failure.[183] The FRC responded to this damning assessment by adopting a "substantial and ambitious" revised version of the code, the 2020 UK Stewardship Code.[184] This new UK Code emphasizes shareholder stewardship activities and

[176] *See generally* Bowley & Hill, *supra* note 144. *See also* Gaia Balp & Giovanni Strampelli, *Institutional Investor Collective Engagements: Non-Activist Cooperation vs Activist Wolf Packs*, 14 Ohio St. Bus. L.J. 135 (2020).

[177] *See* Ben McLannahan, *Japanese Reformists Face Challenge over Shake-Up of Corporate Governance Laws*, Fin. Times, May 25, 2014.

[178] *See* Gen Goto, *The Japanese Stewardship Code: Its Resemblance and Non-resemblance to the UK Code*, *in* Global Shareholder Stewardship 222 (Dionysia Katelouzou & Dan W. Puchniak eds., 2022); Gen Goto, *The Logic and Limits of Stewardship Codes: The Case of Japan*, 15 Berkeley Bus. L.J. 365 (2019).

[179] *See generally* Hill, *supra* note 144, at 513–24.

[180] *See supra* note 178.

[181] *See* Lim, *supra* note 155, at 174.

[182] John Kingman, Independent Review of the Financial Reporting Council ("Kingman Review") (2018).

[183] According to the Kingman Review, the 2012 UK Stewardship Code, which it considered in its review, "whilst a major and well-intentioned intervention, is not effective in practice." *Id.* at 8.

[184] *See* Fin. Reporting Council, *supra* note 143. *See also* Fin. Reporting Council, Revised and Strengthened UK Stewardship Code Sets New World-Leading

outcomes over aspirational policies.[185] It also includes far broader aims than earlier versions, with a marked shift from stewardship involving protection of shareholder interests toward stewardship that encompasses ESG issues, including climate change.[186]

9.4 CONCLUSION

Fiduciary duties and corporate codes, which are designed to constrain directors' conduct and enhance corporate accountability, are key aspects of corporate governance. This chapter discusses some of the complex processes by which these laws and norms have been transmitted nationally and transnationally, and the extent to which this transmission has contributed to a uniform regulatory approach.

It is often assumed that there is a cohesive approach to the law of fiduciary duties across common law jurisdictions. The chapter provides a comparative and historical analysis of three common law jurisdictions – the United States, the United Kingdom, and Australia – and shows that, in spite of their common legal heritage, there are sufficiently important granular differences at a national level, in terms of both law and local legal practice, to challenge the existence of any homogeneous law regarding directors' fiduciary duties in these jurisdictions.[187]

The chapter also discusses an important transnational regulatory development, which has occurred in recent decades across both common law and civil jurisdictions. This is the rise of corporate codes, such as governance codes and stewardship codes. These codes also embody important norms, and could, in theory, contribute to greater corporate governance convergence around the world. However, a critical issue in relation to corporate codes is "who writes the rules." In fact, a range of different bodies issue and administer these codes, and this can affect the focus of the codes and the norms they contain.

Codes are also constantly evolving and can operate differently depending on the underlying capital market structure of the jurisdictions in which they operate. Not

Benchmark (Oct. 24, 2019), https://www.frc.org.uk/news/october-2019/revised-and-strengthened-uk-stewardship-code-sets (accessed June 14, 2022).

[185] *See* Fin. Reporting Council, *supra* note 143, at 11, 13. The 2020 UK Stewardship Code followed the recommendations of the Kingman Review in this regard. *See* Kingman, *supra* note 182, at 10.

[186] *See* Fin. Reporting Council, *supra* note 143, at 15, 27; Paul Davies, *The UK Stewardship Code 2010–2020: From Saving the Company to Saving the Planet?*, *in* Global Shareholder Stewardship 44 (Dionysia Katelouzou & Dan W. Puchniak eds., 2022). ESG has become an increasingly important issue in many stewardship codes in recent times. *See* Katelouzou & Klettner, *supra* note 95 (discussing the interplay between hard law and soft law, in the form of stewardship codes, in relation to ESG and sustainability issues).

[187] *See generally* Hill & Conaglen, *supra* note 28.

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only can these codes differ across jurisdictions, they can also transmute over time, particularly in responding to corporate scandals and crises. For example, some recent codes, such as the 2020 UK Stewardship Code, reflect an image of the corporation as having a far greater societal role.[188] The evolution of both fiduciary duties and corporate codes discussed in this chapter is more consistent with path dependence, rather than convergence, theory in corporate governance.

[188] *See* Hill, *supra* note 15, at 290–91; Davies, *supra* note 186 (highlighting the enlarged objectives of the revised UK Code); Bobby V. Reddy, *The Emperor's New Code? Time to Re-Evaluate the Nature of Stewardship Engagement under the UK's Stewardship Code* 84 MOD. L. REV. 842, 849 (2021); Katelouzou & Klettner, *supra* note 95.