2002

Commentary: Convergence as Movement: Toward a Counter-Hegemonic Approach to Corporate Governance

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One of the most frequently discussed topics in corporate governance during the past several years has been that of "convergence." Briefly stated, the convergence discussion focuses upon whether the increasing internationalization of capital markets and commerce will and should result in the harmonization of corporate governance standards across national boundaries. Within this discussion, some scholars and policymakers tout conversion as imminent, inevitable, and invaluable (e.g., Hansmann & Kraakman 2001). Others expect harmonization of national corporate governance standards to be slowed by path-dependent factors such as local cultural values and the broader political and legal economies of the nation-states (e.g., Bebchuck & Roe 1999; Gilson 1996, 2001; Roe 1996).

In addition to these differences of view pertaining to expected rates of convergence, writers also debate convergence in terms of its source. Some anticipate that convergence will be a formal matter, stemming from changes that would align countries' positive law with one another (e.g., Hansmann & Kraakman 2001). Still others rely upon a more functional view of convergence, noting that positive law is often trumped by the effects of "soft" law such as exchange listing standards, voluntary corporate codes of conduct, and other business and regulatory norms (e.g., Black 2001; Branson 2001; Coffee 1999b, 2001; Gilson 1996).

While these discussions of convergence have been abundant and robust, they also have been sorely mislabeled. What has been characterized as convergence is, at heart, a discussion of Anglo-American hegemony. Convergence, after all, means "to move or be directed toward each other or toward the same place, purpose, or result" (Grove 1976). The only significant movement in Anglo-American corporate governance standards, however, is as an

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LAW & POLICY, Vol. 24, No. 4, October 2002 ISSN 0265–8240

exported commodity being sold to both developed and developing nations (Mitchell 2001). Moreover, these hegemonic tendencies are not confined solely to academics. For instance, large institutional investors in the United States continue to pressure European firms to adopt Anglo-American governance standards (Williams 2002:741–42, n 121). What is absent from most of these discussions of convergence is the willingness to engage the question of whether Anglo-American corporate governance standards might themselves be in need of some realignment.

At this post-Enron juncture in U.S. corporate law, that question can no longer be ignored. For some time, a persistent minority of corporate law scholars has asserted that American corporate governance is itself in need of change (e.g., Greenfield 2002; Mitchell 1995, 2001; O'Connor 1991; Testy 2002). Though wide-ranging in critique, these writers are largely unified in their concern that American corporate law's emphasis on shareholder primacy is misplaced. Kent Greenfield (2002) captures the essence of these progressive corporate law scholars' concerns well: in critiquing shareholder primacy through the lens of corporations' role in the tragedy of the 11 September 2001 attacks on New York's World Trade Centers, he concludes that

> [w]hen all is said and done, all one can say persuasively is that a shareholder-oriented model of corporate law is better for shareholders. It is quite difficult to say it is better for society as a whole, or for the economy, or for other stakeholders. It is even difficult to say it is better for the firm itself. (Greenfield 2002:1428)

In the context of the convergence debate, it is likewise difficult to say that it is better for other nations' firms, for the many constituents of those firms, or for the societies of those nations.

Indeed, there is proof to the contrary. In the United States, each day's news brings yet another round of corporate earnings restatements, as large corporate concerns continue to uncover accounting and other improprieties in the wake of the scandals of companies such as Enron and World Com.[1] Each day's news also brings yet another round of corporate layoffs, cutbacks, and closings, with the concomitant disruptions to employees, suppliers, and communities. Moreover, looking outside of the United States, a number of privatized economies continue to be unable to flourish under American-style market systems that were put into operation despite significant differences in institutional structures available to support those systems (Coffee 1999a). Most everywhere, societal harms such as wealth inequality and environmental degradation continue to increase at alarming rates (Greenfield 2002; Testy 2002).

Accordingly, a complex and urgent question is put into bold relief. Attention must be trained on the task of critically assessing the question of what elements of corporate governance will enhance rather than retard societal flourishing. What will be required is a measured consideration of the fundamental questions of effective corporate governance, including openness to the distinct possibility that unmodified American-style governance may not be the right choice for the United States, let alone for other nations. More specifically, to develop such a counter-hegemonic approach to corporate governance will require a thicker, or more situated, critical assessment of alternative corporate governance systems as well as a recognition of the political questions inherent in discussions of corporate governance.

In their own ways, each of the three corporate governance articles in this issue makes a needed contribution toward that effort. In "The Bonding Effects of Directors' Statutory Wage Liability: An Interactive Corporate Governance Explanation," Ron Davis (2002) cogently examines Canadian corporate and employment law standards that hold directors personally liable upon the corporation's insolvency for wage and benefit claims owed to employees. Through Triantis and Daniels' "interactive model of corporate governance," Davis views employee compensation liability as a form of direct "voice" that can control managerial slack (ibid.:411).

Arguing against current efforts to repeal this directorial liability, Davis makes a strong case that it is not only fair but also efficient to hold directors responsible for the firm's debts to employees (ibid.:413). Employee compensation liability is efficient in Davis's view because it provides directors two countervailing incentives to avoid insolvency. First (unlike directorial liability for torts, regulatory offences, and environmental damage), liability for wage claims does not have the likelihood of encouraging directors to engage in overly low (or negative) net present value investments that increase the potential for corporate insolvency. Second, personal liability for wage claims also provides directors the incentive to "resist the opportunistic risk taking desired by shareholders" when the corporation is in the "vicinity of insolvency" (ibid.:418). Thus, just as directors are dissuaded from taking too little risk that may lead to insolvency, they are likewise discouraged from taking too much risk, the burden of which falls upon creditors in a scheme of limited shareholder liability.

Several aspects of Davis's work demonstrate elements of the counter-hegemonic approach to corporate governance identified above. First, though his article is just part of a larger project, even here Davis delves deeply into Canadian corporate law, not merely in isolation but as situated in a larger legal, political, and cultural framework. Second, Davis paints with a careful brush, negotiating what is often misguidedly presented as a sharp and inevitable dichotomy between fairness and efficiency by showing that wage liability can serve both ends. Similarly, rather than viewing director liability as an all or nothing proposition, he thoughtfully discriminates based on the source of liability, distinguishing employee compensation liability from directorial liability for torts, regulatory offenses, and environmental damage. This distinction opens the door to further consideration of whether there might be other forms of director liability that would be both fair and efficient. It also stands in stark contrast to the fact that American corporate law has witnessed sharp cutbacks in director liability through statutory amendments that permit broad exculpatory provisions in the corporate charter (e.g., Delaware General Corporate Law §102[b][7]).

Finally, Davis' article also refuses yet another classic assumption: that employees and creditors are separate stakeholder groups. Instead, Davis thoughtfully demonstrates the unsecured creditor aspects of the employee's situation, and again opens an important door for further research and reflection. Specifically, are there other creditor-protection mechanisms that might be appropriately extended to employees to enhance their role in corporate governance? Conversely, would such creditor-protection mechanisms for employees instead reduce the salience of employee's claims for an enhanced governance role in the corporation?

Like Davis, John Cioffi also contributes to a counter-hegemonic approach to corporate governance in his article, "Restructuring 'Germany, Inc.': The Politics of Company and Takeover Law Reform in Germany and the European Union." In it, he provides a fascinating account of the 1998 passage of KonTraG, the Corporate Control and Transparency Act – "the only major reform of German company law since 1965" (2002:356). Cioffi first traces how KonTraG's passage was fueled by the political manipulation of populist fears of concentrated financial power, resulting in substantial reforms incorporating Anglo-American corporate governance structures within German law for their perceived democratizing effects (ibid.).

Once the pro-takeover implications of these reforms became apparent, however, German political and economic elites ultimately retarded further Americanization of takeover law in Germany and in the European Union (EU) by generating a backlash against the American emphasis on the market for corporate control. "Ironically, this backlash took its final form in the legislative sanction of the very anti-takeover defenses commonly used in the United States" (ibid.:389). Thus, as is common in the United States, the interests of communities, employees, and suppliers were used as a trope for entrenching management and maintaining existing power relations in society.

With a work that is immersed in the German and EU political economies, Cioffi surfaces and centers the political questions increasingly played out in corporate governance reform. Beginning by noting that "in an era in which state-led intermediation appears to be receding, corporate governance regimes perform an increasingly important intermediation function in the coordination of opposing political constituencies and bodies of regulation," he concludes by lamenting that "ideological commitments collide and constrain attempts to advance agendas of structural change" (ibid.:356, 389). While that is certainly so, it is refreshing to see the questions of corporate governance treated as the political power questions that they indeed are. Unless and until questions of corporate governance are understood as questions of power, "reform" efforts will simply reinscribe existing societal inequalities rather than alleviate them. Accordingly, a counter-hegemonic approach to corporate governance demands interdisciplinary analyses, needing "outsider" insights of political scientists such as Cioffi, just as it also would benefit from increased attention by, for instance, critical race theorists, environmental justice advocates, and feminists.

Lest it be thought that a counter-hegemonic approach to corporate governance is beyond the reach of lawyers and legal academics, however, one need only look to Sarra and Nakahigashi's "Balancing Social and Corporate Culture in the Global Economy: the Evolution of Japanese Corporate Structure and Norms" (2002). This article is an excellent piece of collaborative, comparative scholarship. It is extraordinarily striking in its explicit consideration of the corporation *in* society; for too often matters of corporate law are discussed in the abstract, unmoored from the particular social context in which corporations operate. Though common, this tendency toward abstraction and detachment is particularly odd given that corporations operate only through individuals, individuals with unique social locations. Sarra and Nakahigashi understand this point; indeed, their work is pleasantly suffused with it.

Sarra and Nakahigashi address the "perception in North America that Japanese corporations have shifted to an Anglo-American model of corporate governance" (ibid.:299). Owing in large part to their cultural perspective, but also to their careful and complete assessment of the full range and impact of amendments to Japan's Commercial Code that will take effect in 2003, Sarra and Nakahigashi find the "reality is more "layered" (ibid.). The layering stems from many sources, including norms of corporate rescue (ibid.:308); ethical concerns with corporate control transactions (ibid.:330); an emphasis on enterprise wealth rather than shareholder wealth (ibid.:329); corporate auditing assignments that are often rewards for long service rather than independence of judgment (ibid.:337); and norms of egalitarianism and appreciation for the role of human capital in an enterprise (ibid.:319).

Among other benefits, Sarra's and Nakahigashi's work also reveals the historical character of many current discussions of corporate governance. Although often implicit, convergence discussions echo the view that many nations have corporate governance systems more primitive than the United States, and thus need to evolve toward the enlightened American mode. Sarra and Nakahigashi's work makes clear that this alleged progression may in fact be a regression, noting that "early Japanese corporate governance reflected elements of what is now recognized as the Anglo-American model. However by the early 1900s, this model had fallen into decline and there was substantial concentration of wealth, and the entrenchment of very large Japanese corporations, *zaibatsu*, each consisting of a holding company and numerous production companies" (ibid.:305). To my American ear, this description sounds eerily familiar. It is also, as Sarra and Nakahigashi note, ironic that Japan is again moving toward this Anglo-American system, precisely at the time that failures of that model are so patent in the United States.

While acknowledging the weaknesses in a wholesale American-model of corporate governance, Sarra and Nakahigashi do not celebrate all aspects of Japanese governance structures. For instance, they note that its emphasis on protecting the long-term worker may fail to protect women to the same extent as it does men. This is due to women's systemic exclusion from many long-term employment options despite formal law to the contrary (ibid.:xxx). Sarra has developed elsewhere at more length a feminist analysis of corporate governance, again to her credit, for its evident consideration of the relationship between societal inequalities and corporate law and policy (Sarra 2002).

In conclusion, Sarra and Nakahigashi posit that there are several positive aspects to Japanese corporate governance structures, including its commitments to employee interests and generally broader view of the corporation's role in society. In addition to the positive aspects of Japanese governance structures that Sarra and Nakahigashi note, one could also look to Japan's system for other insights such as a more just model of wages. Susan Stabile has noted that "the gap in pay between U.S. executives and rank and file workers is currently 419 times the pay of average employees, the corresponding pay gap in Japan [is] in the range of twenty or thirty to one" (2001). Increased pay equity should surely be added to the list of positive features of the Japanese system.

Importantly, though, Sarra and Nakahigashi also bring to surface a key normative point, one that is also implicit in Davis's and Cioffi's contributions.

> We suggest that there are positive elements to these features and that in the race to global capital, there should be some consideration of the contribution that Japanese norms and practices can make to effective corporate governance. (Sarra & Nakahigashi 2002:300)

Indeed there should be careful consideration of the contribution that Japanese norms and practices make, just as the norms and practices of Germany, Canada, and other nations' norms and practices should also be considered. What Sarra and Nakahigashi see is that the question of what the elements of an effective corporate governance standard for an increasingly integrated global marketplace should be is still open. It is more likely to be answered by considering, and then combining, some of the most effective elements of several systems than imposing any one system on all nations. Moreover, such an approach would help the convergence discussion live up to its label, making it a discussion about social progress and justice, not one merely about American hegemony.

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NOTE

1. See http://integrationsolutions.westlaw.com/corporatescandals.

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